

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 241**

[FRA Docket No. FRA-2001-8728, Notice No. 3]

RIN 2130-AB38

U.S. Locational Requirement for Dispatching of U.S. Rail Operations**AGENCY:** Federal Railroad Administration (FRA), DOT.**ACTION:** Final rule.

SUMMARY: This Final Rule will supplant an interim Final Rule (IFR) that has been in effect since January 10, 2002, while FRA has gathered comments on whether to permit extraterritorial dispatching (the act of dispatching of a railroad operation that occurs on trackage in the United States by a dispatcher located outside of the United States). Through January 10, 2003, the IFR generally bars extraterritorial dispatching with the following three exceptions: extraterritorial dispatching is permitted in the case of emergencies, but only for the duration of the emergency; extraterritorial dispatching that was normally occurring in December of 1999 is allowed to continue ("grandfathering exception"); and very limited additional extraterritorial dispatching from Canada or Mexico of railroad track in the United States immediately adjacent to the borders is authorized ("fringe border exception"). After considering the comments on the IFR, FRA has determined that while special treatment is appropriate for extraterritorial dispatching that was conducted pursuant to the terms of the IFR, such treatment is better handled through a special waiver process discussed below.

Effective January 11, 2003, the Final Rule adds a new regulation that generally requires, in the absence of a waiver, that all dispatching of railroad operations that occur in the United States be performed in the United States, with two minor exceptions.

First, a railroad is allowed to conduct extraterritorial dispatching from Mexico or Canada in emergency situations, but only for the duration of the emergency. A railroad relying on the exception must provide prompt written notification of its action to the FRA Regional Administrator of each FRA region in which the railroad operation occurs; such notification is not required before addressing the emergency situation.

Second, a railroad that was normally conducting extraterritorial dispatching

from Canada or Mexico in accordance with the terms of the IFR may continue to so dispatch these operations for a transitional 90-day period to permit the railroad to file a waiver petition. This regulation lists of the four lines of track that meet the terms of the "grandfathering exception" of the IFR; FRA is not aware of any additional operations that have been commenced under the "fringe border exception" of the IFR. If a waiver request is filed within the transitional period, the railroad may continue to conduct the extraterritorial dispatching until FRA acts on the waiver petition.

As mentioned above, existing extraterritorial dispatching, as well as proposed new extraterritorial dispatching from Canada or Mexico of railroad track in the United States in the area immediately adjacent to the borders, will be considered under a special fringe border waiver process. A fringe border waiver request by a railroad will generally be granted if the railroad has taken adequate steps to ensure the security of its dispatch center, the railroad has in place specified safety programs for its extraterritorial dispatchers, a government safety agency in the country where the dispatching will occur has safety jurisdiction over the railroad and the dispatchers and is satisfied with the railroad's safety programs, and the railroad agrees to abide by the operating restrictions specified in the rule. FRA anticipates that both Canadian and Mexican railroads can easily meet these requirements for fringe border dispatching of operations, and that FRA will be able to work out satisfactory arrangements with the railroads and the regulatory agencies in Canada and Mexico concerning the monitoring of the agreed upon safety programs.

Railroads that wish to commence additional extraterritorial dispatching may apply for a waiver from the domestic locational requirement. Such a waiver may be granted if an applicant can demonstrate to the satisfaction of FRA that the waiver can be made without compromising or diminishing rail safety.

FRA will continue to explore areas of bilateral cooperation with the governments of Canada and Mexico on extraterritorial dispatching and other cross-border safety issues. FRA will also continue working with the railroads in those countries on cross-border safety issues.

DATES: This regulation is effective January 11, 2003, except for §§ 241.7(a), (b), and (c); 241.9(c); 241.11(c); 241.13(c) and 241.15, which contain

information collection requirements that have not been approved by OMB. FRA will publish a document in the **Federal Register** announcing the effective date.

ADDRESSES: Any petition for reconsideration should reference the FRA docket and notice numbers (Docket No. FRA-2001-8728, Notice No. 3). You may submit your petition and related material by only one of the following methods:

By mail to the Docket Management System, United States Department of Transportation, room PL-401, 400 7th Street, SW., Washington, DC 20590-0001; or

Electronically through the Web site for the Docket Management System at <http://dms.dot.gov>. For instructions on how to submit comments electronically, visit the Docket Management System Web site and click on the "Help" menu.

The Docket Management Facility maintains the public docket for this rulemaking. The docket is available for inspection or copying at room PL-401 on the Plaza Level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: For technical issues related to alcohol and controlled substance matters, Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS-11, 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202-493-6313); or for other technical issues, Dennis Yachechak, Railroad Safety Specialist, Office of Safety, RRS-11, FRA 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202-493-6260). For legal issues related to alcohol and controlled substance matters, Patricia Sun, Trial Attorney, Office of the Chief Counsel, RCC-11, FRA 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202-493-6038); or for other legal issues, John Winkle, Trial Attorney, Office of the Chief Counsel, RCC-12, FRA 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202-493-6067).

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I. Notice Reopening Comment Period on Alcohol and Drug Testing NPRM

Elsewhere in today's *Federal Register*, FRA is publishing a notice soliciting additional comments on its NPRM to amend its alcohol and drug testing rule (49 CFR part 219). 66 FR 64000 (Dec. 11, 2001). (Hereinafter, references to a numbered part are to a part in title 49 of the CFR.) Under the proposed amendments to part 219, employees of a foreign railroad whose primary reporting point is outside the United States who perform train or dispatching service in the United States covered by hours of service laws ("covered service") would become subject to all of the requirements of part 219.

II. Proceedings to Date

On December 11, 2001, (66 FR 63942), FRA published an IFR that prohibited any extraterritorial dispatching for a period of 365 days, but included exceptions for emergency situations, any United States track segment that was regularly extraterritorially dispatched in December of 1999, and fringe border operations, as those operations were defined in the IFR. The IFR went into effect on January 10, 2002, and remains in effect through January 10, 2003.

In the IFR, FRA solicited comments on the benefits and costs of FRA's proposal as well as comments on

whether FRA should adopt an alternative regulatory scheme under which extraterritorial dispatching of United States rail operations would be permitted and, if so, under what conditions. The IFR generated ten written comments, which may be found in the docket and which are discussed below.¹

One of the commenters, CP, requested that FRA delay indefinitely the effective date of the IFR. CP requested the delay because it felt that it was not possible for FRA to resolve all of the issues surrounding the IFR and the related NPRM revising part 219 in such a short period of time. CP felt that it would be better to delay the effective date until written comments could be submitted and FRA's Railroad Safety Advisory Committee consultations could take place. In return for the delay, CP pledged to refrain from expanding any extraterritorial dispatching of United States rail operations.

FRA did not grant the request, however, because CP's operations were not the sole impetus for the IFR. Instead, as explained below, FRA concerns were and still are the recent increase in mergers and acquisitions by and between the larger railroads that has raised the potential for extensive extraterritorial dispatching, the fact that present technology enables any railroad operating in the United States to move its dispatching of United States train operations to any location in the world, and the safety and security problems associated with extraterritorial dispatching of domestic rail operations. In order to preserve the status quo that FRA believed would be jeopardized by delaying the effective date of the IFR, FRA determined that the safest course of action would be to proceed with the IFR and then make a final determination based on the comments received after the IFR had become effective.

In addition to requesting written comments, FRA held a public hearing on the IFR in Washington, DC, on February 12, 2002, at which four parties submitted oral comments. These parties consisted of CP, Canadian National Railway Company (CN), the Brotherhood of Locomotive Engineers (BLE), and the American Train Dispatchers Department of the BLE (ATDD). A transcript of this hearing is available in the public docket of this

¹ Canadian Pacific Railway Company (CP) submitted two items to the docket. Shortly after publication of the IFR, CP submitted a request to delay the effective date of the rule. CP then followed up the letter by submitting comments addressing the issues in the IFR. Thus, there were nine commenters, but FRA considered ten submissions in determining a course of action.

rulemaking. After reviewing both the written and oral comments, FRA has decided that the safety and security issues presented by extraterritorial dispatching mandate that FRA proceed with this Final Rule.

III. Concerns Regarding Extraterritorial Dispatching that Led FRA To Adopt the Interim Final Rule

A. The Importance of Safe Dispatching and the Possibility that Railroads May Conduct Widespread Extraterritorial Dispatching

Proper dispatching is essential for safe railroad operations of both freight and passenger trains. Freight trains can be more than a mile in length, typically carry hazardous materials, and require a mile or more to stop. Freight trains sometimes carry arms, ammunition, and implements of war as well as spent nuclear fuel. Shipments of spent nuclear fuel will dramatically increase once the storage site in Nevada's Yucca Mountain opens in 2010. As was explained in detail in the preamble to the IFR, dispatchers are the railroad employees primarily responsible for the safe movement of trains. See 66 FR 63492. Dispatchers actually steer the train by remotely aligning switches. They determine whether the train should stop or move, and if so, at what speed, by operating signals and issuing train orders and other forms of movement authority or speed restriction. In addition, dispatchers protect track gangs and other roadway workers from passing trains by issuing authorities for working limits. Train crews on board locomotives carry out the dispatchers' instructions and are responsible for actually moving the train, but dispatchers make it possible to do so safely.

Currently, dispatchers located outside of the United States control only very limited train movements in the United States. Their operations are listed in appendix A to the rule and are as follows: 1.8 miles from Windsor, Ontario, to Detroit, Michigan (dispatched by CP); 3.1 miles from Sarnia, Ontario, to Port Huron, Michigan (dispatched by CN); 43.8 miles of the Sprague Subdivision between Baudette, Minnesota, and International Boundary, Minnesota (dispatched by CN); and 99 miles between Vanceboro, Maine, and Brownville Junction, Maine (dispatched by the Eastern Maine Railway Company).²

² The listed distances are the distances dispatched from Canada and not necessarily the distance that a Canadian crew operates a train into

It is commonplace in today's railroad operations for dispatchers to be located at a significant distance from the trackage and operations they control. For example, CSX Transportation, Inc. (CSX) dispatchers in Jacksonville, Florida, control the operations of CSX, Amtrak, and commuter rail lines throughout the Southeast and Mid-Atlantic. In addition, nearly all of the dispatching operations for the Union Pacific Railroad Company (UP), which is the Nation's largest railroad, are conducted from one facility in Omaha, Nebraska. FRA does not believe there are any inherent safety risks in this type of centralized operation, but because current technology allows for such operations, FRA recognizes that this technology allows railroads operating in the United States that now dispatch their trains in the United States to instead dispatch these trains from anywhere in the world.

In addition, FRA is also concerned about the increase in business combinations in the rail industry. Prior to the imposition of a moratorium on railroad mergers by the Surface Transportation Board (STB), there were several high-profile mergers involving both domestic and Canadian railroads. The mergers involving the Canadian railroads resulted in a dramatic increase in the amount of domestic track owned by Canadian railroads. For example, CN acquired the Grand Trunk Western Railroad, Inc. (GTW) (646 miles of track operated by GTW (1998 figures)), the Illinois Central Railroad Company (2,591 miles of track), and the 2,500 route miles of United States Class II and III railroads formerly owned by the Wisconsin Central Transportation Company. In addition, CP acquired the Soo Line Railroad Company (3225 miles of track operated). Now that the STB moratorium has been lifted, it is legally possible that more railroads will combine, resulting in larger multinational railroads and increasing the appeal of cross-border operations.

B. Regulatory Oversight and the Potential for a Regulatory Gap

Any dispatcher, wherever located, who controls rail operations while under the influence of alcohol or drugs, exhausted because of working excessive hours, or not properly trained and tested on railroad operating rules could issue incorrect directions or could fail to issue directions, thereby jeopardizing the safety of railroad employees or causing

the United States. A Canadian crew could operate the train further into the United States than a listed distance but a U.S.-based dispatcher would control the movement beyond the listed distance.

a train collision or derailment with resulting injuries or death to train crews, passengers, or both, and possible harm to surrounding communities and the environment; the harm could be widespread if the trains are carrying hazardous materials such as spent nuclear fuels. Domestically, there have been accidents resulting from, for example, a dispatcher failing to relay to a train crew that a grade crossing was out of service (e.g., on January 9, 2001, a dispatcher at a CN/Illinois Central Railroad communications facility mistakenly cleared a grade crossing for normal operations, resulting in a collision between a train and a motor vehicle at the crossing); a dispatcher routing a train into the path of another train (e.g., on June 22, 1997, a dispatcher failed to communicate correct track warrant information, causing two freight trains to collide head-on in Devine, Texas, killing four persons); and a dispatcher allowing a train to enter working limits when roadway workers and equipment were present (e.g., on January 29, 1988, an Amtrak passenger train struck maintenance-of-way equipment, resulting in numerous injuries and substantial property damage; the National Transportation Safety Board determined that the accident was caused by a dispatcher who was impaired by drugs).

Because problems such as fatigue, drug and alcohol abuse, and lack of effective job training seriously compromise the safety-critical performance of employees who dispatch trains, the United States has established safety requirements that, together with FRA safety oversight, effectively deal with these problems for railroad dispatchers located in the United States. 49 U.S.C. ch. 51, 201–213; 49 CFR 1.49. Examples of safety rules and laws governing domestic dispatchers include operating rules and efficiency testing (part 217), drug and alcohol testing (part 219), and hours of service restrictions (49 U.S.C. 21105, and part 228). To promote compliance, FRA may conduct inspections and investigations and impose sanctions for violations of its safety standards against both railroads and individuals, including dispatchers, if the individual or railroad is located in the United States. *See, e.g.*, 49 U.S.C. 20107; 49 U.S.C. ch. 213; and part 209, appendix A (a description of FRA's safety enforcement program and policy). However, paragraph (c) of § 219.3 currently exempts employees of a foreign railroad, including dispatchers, whose primary reporting point is located outside of the United States and

who perform service in the United States covered by the hours of service laws from subparts E (identification of troubled employees), F (pre-employment testing), and G (random testing). As previously noted, FRA has issued an NPRM that would amend part 219 to require drug and alcohol testing of such an employee. The comment period on the part 219 NPRM has been extended by a notice published elsewhere in the **Federal Register** today.

Besides enforcing the Federal railroad safety laws, FRA may also take other safety-related actions. For example, FRA may conduct investigations of railroad accidents in the United States, including those involving dispatching, and may issue reports on the agency findings, including its determination of probable cause. *See, e.g.*, 49 U.S.C. 20107, 20902; 49 CFR 225.31. In addition, FRA may conduct research and development as necessary for every area of railroad safety, including dispatching. 49 U.S.C. 20108. Moreover, FRA may issue rules and orders, as necessary, for every area of railroad safety, including dispatching. *See* 49 U.S.C. 20103. Such orders may include emergency orders to eliminate or reduce an unsafe condition or practice, identified through testing, inspecting, investigation, or research, that causes an emergency situation involving a hazard of death or injury to persons. *See* 49 U.S.C. 20104. Finally, FRA has recently taken a pro-active approach in its ability to influence non-regulated aspects of dispatching operations through its Safety Assurance and Compliance Program (SACP),³ through its safety advisories published in the **Federal Register**, and through its visits to dispatching centers to ensure that dispatching is being safely conducted whether or not specific federal standards are being violated (see discussion under section IV B of the supplementary information section of the preamble, below).

With regard to dispatchers located in foreign countries, FRA may be unable to rely on foreign laws and rules governing dispatchers, in themselves, to ensure safety in accordance with FRA requirements. There can be a number of complexities in the ways foreign laws and regulations apply to dispatching. First, although dispatching can be performed from any country in the world, not every country in the world has an entity that regulates rail

³ FRA's SACP is an approach to safety that emphasizes the active partnership of FRA, rail labor representatives, and railroad management in identifying current safety problems and jointly developing effective solution to those problems. For more information see 66 FR 63946.

transportation safety. Second, even if the host country has established a transportation regulatory entity, that entity may well lack full safety jurisdiction over the railroad operations in the United States that are being dispatched from the host country. In either situation, the rail operations in the United States may not fall completely under the jurisdiction of any rail safety regulatory body, resulting in a regulatory gap that could jeopardize the safety and security of domestic operations.

This potential regulatory gap could significantly interfere with FRA's ability to ensure that extraterritorial dispatching operations are conducted with the same level of regulatory oversight that occurs in the United States and which FRA believes is vital to the safety of those operations. As noted in the preamble to the IFR, FRA is particularly concerned that current regulations and statutes applicable to dispatchers, which govern such areas as hours of service limitations, operational testing, and drug and alcohol programs, most notably random drug testing, are not uniform throughout foreign countries, and may fall below the safety standards established by the United States statutes and regulations. *See* 66 FR 63948. Therefore, even if a foreign country's regulations and statutes applied to and completely covered cross-border dispatching of United States rail operations, the safety of the United States rail operations may not be protected to the same degree as when dispatchers are subject to United States' statutory and regulatory requirements or their equivalents.

C. Security Concerns

In addition to the above-described potential negative implications on rail safety of extraterritorial dispatching, FRA is also concerned about the security of domestic rail operations and how that security would be impacted if FRA permitted increased extraterritorial dispatching. As the terrorist attacks of September 11, 2001, vividly demonstrated, this nation and its citizens are targets of international terrorists, and railroad dispatch centers are logical terrorist targets. While those attacks have resulted in increased railroad security domestically, dispatching centers located in foreign countries would be outside the jurisdiction of domestic security and law enforcement agencies. Thus, if FRA permits extraterritorial dispatching, the United States would increase its exposure to security threats that exist in foreign countries and be forced to rely upon the security apparatus of foreign

countries. As noted above, current technology allows dispatching of domestic rail operations from anywhere in the world, including countries that may not offer the same levels of security and security measures that are offered by domestic agencies.

In addition, given the threat that terrorists pose to railroad systems, including their dispatch centers, railroad security measures (*e.g.*, guards that control access to railroad facilities, proximity cards that allow access to dispatching locations, use of railroad police to detect unauthorized persons on railroad property, and background checks on applicants for employment as dispatchers and train crew members) are increasingly important to protect railroad property, railroad cargo, railroad employees, and railroad passengers from violent actions. FRA is working with domestic railroads as they review the adequacy of their security plans and expects that the railroads will voluntarily take whatever steps are needed to safeguard their systems from terrorists. In the event that FRA is not satisfied with the security measures undertaken by a domestic railroad, however, FRA has the authority to require, through regulations and orders, additional security measures that FRA determines are necessary to protect the security of domestic railroad operations against potential terrorist threats.⁴ FRA may have limited access to and ability to influence security arrangements at a foreign dispatch center if the security procedures at that center were not sufficient to protect domestic rail operations. Furthermore, law enforcement and security agencies in the United States are not authorized to protect foreign dispatch facilities.

FRA does not know, at this time, whether all foreign railroads employ security measures comparable to those of United States railroads, or whether foreign governments have enforceable security requirements that would effectively protect foreign dispatch facilities. In addition, domestic railroads that locate dispatching facilities in foreign countries may not necessarily employ the same security measures that they use in the United States. As a result, foreign-based facilities, whether

⁴ Section 20103(a) of title 49, United States Code, gives the Secretary of Transportation plenary authority to address any hazards to life and property that may arise in the context of railroad operations. To date, FRA's exercise of this authority has been fairly limited. For example, FRA has issued rules on Passenger Train Emergency Preparedness (part 239) that require passenger railroads to conduct detailed planning for emergency situations, which are defined to include "security situations" such as bomb threats. (*See* § 239.7 and 49 U.S.C. 20133(a)(4).)

owned by a foreign or a domestic railroad, could be more attractive targets than facilities located in the United States and be more susceptible to terrorist infiltration or attack.

There is also a national defense aspect to the security of railroad operations. There are both railroad safety and national defense risks posed by extraterritorial dispatch centers having access to information regarding the shipment of military goods and weapons and hazardous materials (including nuclear materials and nuclear waste), and having the capability to control the movement of these items. The Military Traffic Management Command of the Department of Defense (DOD) and FRA have worked together to identify and designate a Strategic Rail Corridor Network (STRACNET). STRACNET consists of more than 38,000 miles of interconnected network of rail corridors (not actual rail lines) in the United States that the agencies have deemed vital to national defense. In the event of a large-scale military mobilization, it is very important that this network be fully responsive to national defense needs and priorities.

D. Other Safety-Related Concerns

In the preamble to the IFR, FRA also detailed other potential concerns with regard to extraterritorial dispatching. *See* 66 FR 63950-63951. First, it is essential for safe railroad operations that employees involved with directing and effectuating train movements be able to communicate clearly with each other. The railroad personnel most directly involved with train movements are the dispatchers who transmit written and oral instructions to train crews and the train crews who are responsible for carrying out the dispatchers' instructions and for operating trains in accordance with railroad traffic control devices. In addition, dispatchers must also be able to communicate with roadway workers who may control entry onto the stretches of track on which they are working. If it is allowed, extraterritorial dispatching raises the possibility that some of these employees may not be able to communicate with each other because they speak different languages.

FRA's primary safety concern is that one of the parties (either the train crew or the dispatcher) involved in an extraterritorially dispatched operation may not be proficient in the language that is being used to conduct train operations. Thus, there is the potential for miscommunication where one of the parties, unbeknownst to the other, fails to convey necessary safety-critical

information, inadvertently conveys false or misleading information, or fails to properly understand safety-critical information that has been conveyed. The results of such a miscommunication could be disastrous. Such a lack of understanding would be even more problematic if railroad operations crossed more than one border (e.g., Canada, the United States, and Mexico).

Another problem related to communication that could arise if extraterritorial dispatching is allowed concerns possible differences in railroad terminology between one country and another. The railroad industry in the United States is both a highly technical industry that uses modern terms and an industry that has existed for 170 years and uses terms that have existed since the beginning of the last century. It would be unreasonable to assume that, absent appropriate training, railroad employees in other countries would be familiar with terms used in the United States. Given the immediacy with which problems sometimes develop while trains are on the tracks, it would be dangerous to discover such a miscommunication at a time when lives and property are in the balance. This problem would be compounded if the dispatcher and the train crew were having problems communicating because of language differences.

Second, given the centralized nature of most major railroads' dispatching facilities, FRA is concerned that a disruption of communications at a dispatching facility could cause system-wide problems for a railroad as it scrambles to transfer operations from the centralized location to local dispatch centers. The preamble to the IFR notes the two recent occasions where the CSX dispatch center in Jacksonville, Florida, went off line due to extreme weather conditions. See 66 FR 63951. As those examples demonstrated, domestic dispatch centers are not immune to such problems, but FRA is concerned that the effects of such a disruption could be exacerbated if the dispatching facility were located in a foreign country far away from the railroad's infrastructure.

FRA is also concerned about the potential effects that a labor disruption involving an extraterritorial dispatch facility could have on domestic rail operations. Dispatchers are typically unionized employees subject to the Railway Labor Act (45 U.S.C. 151-188) ("RLA"), which prohibits strikes over contract interpretations. Congress has the power to legislate an end to a strike by United States railroad employees, and has done so in 13 rail labor contract disputes. Dispatchers located in a

foreign country, however, are not subject to the RLA, and Congress may not legislate an end to a labor dispute in that country despite the fact that such a dispute could severely affect United States rail operations, and possibly jeopardize transportation safety.

The implications of a strike that cannot be readily controlled by government authorities have the potential of being quite severe, especially to the extent that it affects the shifting of rail freight and passenger traffic to crowded highways, the delivery of perishable goods to market, the delivery of coal for energy to parts of the country in need during extreme weather conditions, and transport of defense materials needed to ensure national security. The railroad industry carries nearly 40 percent of United States intercity freight traffic in terms of ton-miles (over 1 trillion ton-miles a year), including huge quantities of hazardous materials of all types, including spent nuclear waste. By comparison, trucks carry about 29 percent of the ton-miles, and pipelines and inland water transport account for the remainder. In addition, railroads provide commuter rail service in and around many of the Nation's large cities; provide the infrastructure Amtrak uses for its intercity passenger operations outside the Northeast Corridor; and provide freight service to military facilities across the country. Other modes would be able to replace only a small portion of the transportation services provided by the railroads in the short term in the event of a disruption of service affecting the national major freight railroads, and diverting hazardous materials from railroads to other modes of transportation, such as trucks and barges, would increase the exposure of both the public and the environment to these hazardous materials and could increase the possibility of accidents.⁵ Furthermore, loaded railroad tank cars that cannot be delivered to customers and that are stranded on rail lines pose ready targets for terrorists. A disruption affecting any one of the major railroads could, of course, have a critical impact over time through cascading impacts across the national rail system because of the extensive interchange of rail traffic among the railroads and the impact on other railroads of service disruptions on

⁵ Railroad tank cars can typically carry up to four times the volume typically carried by truck cargo tanks, so diverting hazardous material movements to the highways would significantly increase the highway movements of these dangerous commodities. In addition, any transloading of hazardous materials from rail tank cars to truck cargo tanks poses additional risks.

lines where they enjoy trackage or haulage rights.

Finally, it is also essential for safe railroad operations in the United States that certain railroad communications concerning such operations that relate to measurements of such critical factors as location, distance, and speed, use a common standard of measurement. The two currently used standards of measurement are English units, used predominately in the United States, and the International System of Units ("SI"), which is more commonly known as the "metric system" and is used by most of the rest of the world. Because a kilometer (roughly 3,280.8 feet) is approximately six-tenths the length of a mile (5,280 feet), the potential for confusion is obvious, especially where a measurement of such matters as speed, location, or distance is concerned. If a dispatcher instructs a train and engine crew to travel a specified number of kilometers at a certain speed measured in kilometers per hour and the crew mistakenly thinks that the dispatcher is referring to either or both measurements in miles, the consequences could be at best problematic and, at worst, devastating.⁶

Commenters' responses to FRA's concerns leading to the issuance of the IFR are discussed below.

IV. Discussions of Specific Comments and Conclusions

A. Overview of the Comments and FRA's Conclusions

In the IFR, FRA offered two options with regard to increased extraterritorial dispatching operations. The first option, which was reflected in the IFR, is to bar extraterritorial dispatching with the three minor exceptions explained above (emergencies, grandfather operations in place since December 1999, and fringe border operations that met the terms of the IFR). The second option is to permit extraterritorial dispatching so long as (1) the foreign-based dispatchers are subject to the same safety standards applicable to dispatchers located in the United States (and enforced by FRA or by the host country with supplementary FRA oversight), and (2) the additional safety concerns previously identified, such as security, language differences, possible

⁶ FRA recognizes that the Hazardous Materials Regulations require that most measurements regarding the transportation of hazardous materials be given in metric units. Under 49 CFR 171.10, in order to ensure compatibility with international transportation standards, most units of measurement in the hazardous materials regulations are expressed using the SI. This requirement should have no impact on extraterritorial dispatching, however, as SI is currently the standard for domestic railroad operations involving hazardous materials.

labor strikes and other disruptions, are adequately addressed. FRA noted that the second option could be implemented by a more detailed version of the waiver provision (section 241.7) of the IFR. In the preamble to the IFR, FRA solicited comments both on the benefits and costs of the approach advocated by the IFR as well as on the feasibility of adopting the alternate option and allow extraterritorial dispatching provided FRA's safety and security concerns are effectively addressed. FRA indicated that after considering the comments FRA might make the IFR permanent with any substantive changes FRA determines are appropriate.

As noted above, nine parties submitted written comments, and four of those parties offered oral comments, as well. The parties submitting written comments were CN and CP, which, when appropriate, will be referred to jointly as "the Canadian railroads," the Brotherhood of Maintenance of Employes (BMWE), the Northeast Illinois Railroad Company (METRA), the Brotherhood of Railroad Signalmen (BRS), the BLE, the Association of American Railroads (AAR), the ATDD, and the Mexican government.

The Canadian railroads, either individually or collectively, commented on most of the issues raised in the IFR, so FRA's responses will focus primarily on those comments. In general, both railroads objected in principle to the regulation and argued that a better resolution to this issue would be for FRA and Transport Canada, along with the individual railroads, to work out problems on a case-by-case basis, instead of FRA implementing a "one size fits all" regulation for a safety problem that they believe does not currently exist. Both railroads wanted to retain sufficient flexibility to conduct their existing operations and, if FRA promulgates part 241, both were in favor of retaining both the grandfathering provision and the exception for "fringe border operations," although in a slightly modified form. In addition, both expressed concern that the definitions of "dispatch" and "dispatcher" were too broad and could be read to include employees who should not be included.

The comments from the BLE, the BMWE, METRA, and the BRS were all fairly general in nature and supported FRA's implementation of a bar on additional extraterritorial dispatching. The comments from the ATDD were also generally supportive of the IFR but, in addition, offered suggestions on specific provisions of the rule that it believes should be slightly modified. The brief comments from the AAR

focused solely on the definitions of "dispatch" and "dispatcher" contained in the IFR. The Canadian government did not submit comments on the IFR, but did comment on the NPRM on part 219. Some of the Canadian government's comments are relevant to FRA's position on the necessity of random testing of dispatchers and will be addressed below. Finally, the comments from the Mexican government supported the banning of extraterritorial dispatching and noted that Mexico has banned extraterritorial dispatching.

Before reviewing the specific comments, FRA notes that all of the negative comments on the IFR related to the safety and security of dispatching United States rail operations from Canada, but did not address extraterritorial dispatching from any other country. Therefore, the safety and security concerns detailed in the IFR and reiterated above remain unchallenged with respect to any country other than Canada. Accordingly, unless otherwise noted, FRA's analysis of the comments is limited to whether the actions taken by the Canadian railroads and Canadian authorities adequately address FRA's concerns.

Based on FRA's analysis of the comments, FRA has decided that the general bar on extraterritorial dispatching, except relief in cases of emergency, should continue. However, FRA has determined that it is appropriate to provide special relief for the four existing extraterritorial dispatching operations (listed in appendix A to the Final Rule), and for limited new extraterritorial dispatching of fringe border areas in the United States designed to facilitate the smooth handoff of dispatching between dispatchers in Canadian and Mexican dispatching centers and those in the United States. Such relief is best granted in the context of waivers rather than blanket approvals of the operations, and a special fringe border waiver process has been established to facilitate that relief. (The fringe border waiver process is briefly discussed below and in more detail in the section-by-section analysis.) The Final Rule provides that existing extraterritorial dispatching can continue for a transitional period 90-days to permit the railroads to file a waiver petition under the new special fringe border waiver provision. If a waiver request is filed within the transitional period, the railroad may continue to conduct the extraterritorial dispatching until FRA acts on the waiver petition.

The fringe border waiver process applies to existing extraterritorial dispatching operations and to new extraterritorial dispatching of operations that do not extend more than five route miles into the United States from the Canadian or Mexican border. A fringe border waiver request by a railroad will generally be granted if (1) the railroad has taken adequate steps to ensure the security of its dispatch center, (2) the railroad has in place specified safety programs for its extraterritorial dispatchers, (3) a government safety agency in the country where the dispatching will occur has safety jurisdiction over the railroad and the dispatchers and is satisfied with the railroad's safety programs, and (4) the railroad agrees to abide by the operating restrictions specified in the rule. Given the limited length of these operations, FRA is willing to permit the operations to be conducted with fewer safety requirements than would be required for longer operations. FRA anticipates that both Canadian and Mexican railroads can easily meet these requirements for cross-border dispatching of operations, and that FRA will be able to work out satisfactory arrangements with the railroads and the regulatory agencies in Canada and Mexico concerning the monitoring of the agreed upon safety programs.

Railroads that wish to commence additional extraterritorial dispatching may apply for a waiver under subpart C of 49 CFR part 211 from the domestic locational requirement set forth in part 241. Such a waiver may be granted if an applicant can demonstrate to the satisfaction of FRA that relief is consistent with safety and in the public interest. As discussed in the section-by-section analysis, an applicant will be expected to discuss how it has adequately addressed the various safety concerns that FRA laid above in section III of the supplementary information section of the preamble.

FRA believes that the approach that it is adopting is necessary to ensure the safety and security of United States railroad operations.

B. Regulatory Oversight

CN was the only commenter that directly addressed regulatory oversight, although CP's comments included many references to the adequacy of the Canadian regulatory system. The main focus of the Canadian railroads' comments was that while the regulatory construct in Canada may be different from that in the United States, there are sufficient protections in place in Canada to ensure that any United States rail

operations dispatched from Canada would be done so safely.

In particular, CN stated that Transport Canada and Human Resources Development Canada combine to regulate any dispatchers located in Canada regardless of the territory they dispatched, even territory located in the United States. In addition, during the public hearing, CN's representative stated that Transport Canada's regulations would cover contractors located in Canada who were conducting dispatching operations for a Canadian railroad. The commenters noted that Transport Canada's Safety Management Systems regulations require the railroads to develop a comprehensive plan covering all aspects of rail safety, and that the Canadian Labour Code, together with the collective bargaining agreements of the railroads, effectively control the number of hours that dispatchers may work. Finally, CN claims it would allow FRA access to CN dispatching facilities located in Canada in order to conduct site inspections and safety assessments.

There are contrasts between the regulatory systems of the United States and Canada. Domestically, Congress and FRA have concentrated on promulgating nationwide safety standards that apply uniformly to all railroads. Congress has established the maximum number of hours that a dispatcher may work, has directed FRA to establish comprehensive drug and alcohol testing for safety-sensitive railroad employees such as dispatchers, including random drug testing, and has given FRA authority to regulate all areas of railroad safety. FRA has established minimum safety standards, and the railroads are required to conduct their own inspections to ensure that these safety standards are being met. FRA leads a cadre of approximately 550 Federal and State safety inspectors and specialists whose role is to monitor the railroad industry and its own inspection forces for compliance with rail safety laws and to work with the railroad industry on resolving safety problems that are not subject to those laws.

FRA's safety oversight has proven effective in identifying and resolving safety problems that are not directly addressed through FRA's regulations. For example, in 1997 FRA conducted extensive audits of the UP's Harriman Dispatch Center which controls operations on approximately 95 percent of UP's territory. These audits revealed ineffective and unsafe practices by supervisors and dispatchers. FRA made specific recommendations that UP accepted, such as creating additional dispatch positions, realigning

dispatchers' territories to better balance the workload, hiring new dispatchers, tripling the number of dispatching supervisors, making improvements to the dispatching software, and forming a working group consisting of representatives from FRA, rail labor, and UP management to continually monitor and address dispatching issues that may arise. This is one just one example of the United States' more proactive approach to regulatory oversight, which is intended to ensure that railroad safety does not fall below an acceptable level.

The Canadian regulatory system, on the other hand, tends to rely more heavily on acceptance of railway-submitted rules. Under this approach, railroads conduct consultations with government (and often labor organizations) and submit standards and procedures for approval. In some cases the rules apply to individual railroads, and in other cases the rules apply in common to the major railroads.

Under Transport Canada's Railway Safety Management Systems regulation, railroads are required to identify the following: (1) Their company railroad safety rules and orders, and the procedures they will use in demonstrating compliance with them; (2) systems for accident and incident reporting, investigation, analysis, and corrective action; (3) systems for ensuring that employees have appropriate skills and training and adequate supervision to ensure that they comply with all safety requirements; and (4) procedures for periodic internal safety audits. Railroads are also required to do the following: (1) Maintain accident and incident investigation reports and corrective actions they take for the purpose of assessing its safety records; (2) report yearly to the Minister on their safety management system; and (3) keep readily available all documents mentioned in their safety management system to enable a railway safety inspector to monitor compliance with Transport Canada's safety management system regulation. Transport Canada then monitors the railroads' compliance with their safety programs. The Safety Management System approach is a new element in the Canadian regulatory structure, and initial audits are only now underway.

As will be detailed below in the preamble sections on drug and alcohol testing and hours of service, the safety programs that the Canadian railroads have developed and the Canadian standards and the government oversight in these areas are significantly different from FRA standards. While FRA requires domestic railroads to conduct

efficiency testing of their dispatchers to ensure that they understand the necessary operating rules, and issues civil penalties against those railroads for failing to conduct such testing, Transport Canada has no such requirement (apart from the recently adopted Safety Management System process). While Canadian carriers have voluntarily conducted such efficiency testing, they are not assessed monetary fines should they fail to follow their programs. On the other hand, administrative officials from the inspector level to the Minister enjoy broad powers to order changes in operations and address unsafe conditions. Based on available information, it appears that the Canadian Transportation Safety Board has broad accident reporting requirements; however, the means for enforcing those requirements are not immediately evident.

Given the differences in Canadian railway culture, methods of governance, safety standards (including regulations and rules), safety data systems, and mechanisms for enforcement, it is extremely difficult to evaluate the relative equivalence of the two regulatory approaches in terms of overall safety results, let alone at the level of safety of dispatching. Without question, cooperation and understanding between Transport Canada and FRA is maturing at a more rapid pace due to enhanced communication and joint endeavors; and much remains to be learned through appropriate consultation. Cooperation with respect to security presents a new special challenge, given divisions of responsibility within both governments and evolving policies in both countries. Accordingly, it is appropriate that FRA continue consultations with Transport Canada and develop the necessary factual predicates and institutional arrangements before giving consideration to permitting more extensive dispatching of U.S. operations. Appropriate institutional arrangements might include express mutual undertakings (which do not currently exist) for each government to look out for the safety of operations in territory outside its jurisdiction that are dispatched from anywhere within its jurisdiction.

Mexico also recognized that extraterritorial dispatching poses a safety risk to rail operations and has addressed the issue by requiring, in Article 26 of Title III of the Regulatory Law of Railroad Service (*Ley Reglamentaria del Servicio Ferroviario*), that railroads depend on dispatching facilities that must be established within

Mexico. In addition, Article 96 of Title III of the Railroad Service Regulations (Reglamento del Servicio Ferroviario) reiterates that a railroad's system of train control must guarantee the safe and fluid operation of services and must adhere to what is established by Mexican law. In comments submitted by the Directorate of Technical Operations Regulations of Railroad Transportation, the Mexican government indicated that it believes FRA is acting in the best interests of rail safety by barring extraterritorial dispatching. The comments specifically noted the differences in regulations between countries and the problems that could arise when personnel in foreign countries dispatching Mexican operations are not subject to Mexican law as justifications for a bar on extraterritorial dispatching of Mexican operations.

C. Existing Extraterritorially Dispatched Operations

In the preamble to the IFR, FRA noted that there are several existing extraterritorially dispatched operations, and then gave the specifics of those operations. CP commented on both the safety records of their existing operations as well as the details of those operations offered by FRA in the preamble while CN's comments only offered additional information on the specifics of their cross-border operations. CP's comments noted that they have safely dispatched seven cross-border operations for some time. Along with their comments, the Canadian railroads submitted updated lists of their current cross-border operations and requested clarification on whether those operations would be grandfathered under the applicable provisions of the Final Rule. CN acknowledged the three segments listed in the IFR and added a fourth. CP asserted that it dispatched seven cross-border operations and listed those operations in an appendix to its comments.

After reviewing those submissions and further researching the track segments, FRA has concluded that only the four segments listed in appendix A to the Final Rule are actually dispatched and the other segments are either controlled by another method of operation or no longer in service. Operations on six of the track segments are currently controlled by Rule 105 of the Canadian Rail Operating Rules, which mandates that trains operate at "reduced speed." Reduced speed is defined as a speed no faster than that necessary to stop within one-half the range of vision. No actual permission is

required to operate on the track but, any train that does run on those segments must operate in accordance with Rule 105. The final track segment was in operation during December 1999 but has since been abandoned.⁷

In commenting on the IFR, CP also pointed out that neither the Federal Motor Carrier Safety Administration nor the Federal Aviation Administration (FAA) has a locational requirement for dispatchers of trucks and airliners that come into the United States from another country. FRA does not find the absence of such regulations instructive in resolving the question of whether any form of extraterritorial dispatching of railroad operations is consistent with railroad safety and the security of the United States. Nevertheless, it should be recognized that truck dispatchers have virtually no safety role, while railroad train dispatchers are the primary protectors of safe railroad operations. As previously discussed train dispatchers actually steer the train by remotely aligning switches; they determine whether the train should move or stop by operating signals and issuing train orders and other forms of movement authority; and they protect roadway workers from passing trains. Air traffic controllers, as contrasted to truck dispatchers, do perform a safety role although not as comprehensive as train dispatchers. FRA recognizes that the FAA permits limited cross-border dispatching of airlines into the fringe border areas of the United States to facilitate the safe hand-off of air operations to domestic air traffic controllers. The final rule provides for waivers of such fringe border rail operations. Other aircraft operations over/on U.S. soil are handled by U.S. air traffic controllers at U.S.-based control centers. There are of course differences between airline and railroad operations, and each mode of operation presents different safety concerns requiring different regulatory approaches.

As noted above, FRA has decided not to include a grandfathering exception for existing lines in the Final Rule. Given the possibility that railroads could increase extraterritorial dispatching, FRA issued the IFR in order to preserve the status quo until all the issues surrounding extraterritorial dispatching could be fully examined. After reviewing the comments and further examining the issues, FRA has determined that the safety and security risks inherent in extraterritorial

⁷ One of the segments listed in CN's submission is still in existence but is now dispatched by CP. That segment is the 1.8 mile stretch of track between Windsor, Ontario, and Detroit, Michigan.

dispatching are too serious to allow an operation to continue merely because it was in existence at a certain point in time. FRA acknowledges the comments from CP attesting to the fact that its cross-border operations have been safely conducted for many years, but FRA does not believe that reason alone can justify allowing these operations, especially since the nature of the operations (such as traffic levels in general, and volumes of hazardous materials being handled) can greatly increase in the future, thereby increasing the safety risk to the areas surrounding that track.⁸ The North American Free Trade Agreement (NAFTA) has increased trade among the United States, Mexico, and Canada. This in turn has increased the amount of transborder rail traffic in the United States. Incoming train crossing data are collected monthly at border ports by the United States Customs Service. In 1997, there were 7,479 train crossings into the United States from Mexico and 30,337 from Canada. This translates into an average of 104 trains crossing into the United States daily. As transborder traffic continues to increase on existing rail lines, it is likely that train speeds, which currently do not exceed 55 miles per hour at the borders, and train lengths will increase along with the actual number of trains crossing into the United States. This will increase the exposure of trains and other rail vehicles to railroad accidents at or near the borders with Mexico and Canada.⁹ As it faces this new operating environment with greater risk, the railroad industry must take precautions

⁸ Each of the four existing extraterritorial dispatched lines carries hazardous materials, with the volume on two of the lines being substantial; unsafe dispatching of any of the four operations would jeopardize safety. The loaded hazardous materials carloads carried on the four lines in 2001 were as follows: the CN line from Sarina, Ontario, to Port Huron, Michigan—41,819 carloads; the CN Sprague Subdivision line between Baudette, Minnesota, and International Boundary, Minnesota—25,598 carloads; the CP line from Windsor, Ontario, to Detroit, Michigan—2,831 carloads; and the Eastern Maine Railway Company's line between Vanceboro, Maine, and Brownville Junction, Maine—464 carloads.

⁹ Between 1998 and 2001, the value of rail traffic moving between the United States and Canada has grown from \$49.65 billion (U.S. dollars) to \$60.17 billion, which is a 21.2 percent increase over the period or an annual rate of 4.9 percent. (Since the traffic mix has not changed significantly during this period, "value" can be considered a good proxy for physical units such as tons or carloads.) Traffic attributable to eastern gateways (Customs ports in United States border states of Michigan and eastward) has grown slightly more rapidly: \$39.69 billion (U.S. dollars) to \$49.07 billion, or 23.6 percent overall, or 5.4 percent per year. It is commonly expected that trade between the United States and Canada will continue to increase in the future. These data are based on USDOT, Bureau of Transportation Statistics, Transborder Surface Freight Data public files.

to avoid an increase in the number of accidents and incidents caused by human error.

FRA has a responsibility to ensure that existing extraterritorial dispatching operations will be conducted in accordance with minimum safety programs for the dispatchers in the areas of efficiency testing, hours of service, and alcohol and drug abuse that are actively monitored by a government regulatory agency, that communication by the foreign-based dispatchers with train crews and maintenance of way workers in this country are understood and that there is no misunderstanding with regard to references to units of measurements such as location, distance, and speed, and that the dispatching operations will be conducted in a dispatch center that has adequate security measures in place. The fringe border waiver provision of the Final Rule is the most effective way for FRA to address these matters. The section-by-section analysis provides a detailed discussion of the fringe border waiver process.

FRA anticipates that the Canadian railroads can easily meet the requirements for approval of fringe border dispatching. FRA is delaying the effective date of the rule with respect to these four existing operations for 90 days to enable the railroads to file a waiver request under the special fringe border waiver process. If a waiver request is filed by April 11, 2003, such operations can continue until the waiver request is acted upon by FRA.

D. Drug and Alcohol Testing

One of FRA's main concerns with regard to extraterritorial dispatching is the potential lack of an effective drug and alcohol testing program in other countries. In the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143 (the Act), Congress recognized the importance of drug and alcohol testing in protecting the safety of domestic transportation systems. As stated in the fifth Congressional finding in that Act, Congress believed that "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing." Given that the misuse of alcohol and drugs has proven to be a critical factor in transportation accidents, testing is integral to ensuring that domestic transportation systems, including railroads, operate in the safest possible manner. In response to Congress' directives in the Act, FRA expanded the testing requirements in its existing part 219 regulations. See 49 U.S.C. 20140.

As was stated in the preamble to the IFR, under FRA's mandatory alcohol and drug testing program, dispatchers working in the United States are now subject to general restrictions on the possession and use of alcohol and drugs, employer policies covering voluntary referral and co-worker reporting of drug and alcohol abuse problems, and random, reasonable suspicion, return-to-duty, follow-up, and post-accident drug and alcohol testing, as well as pre-employment testing for drugs. Post-accident testing is required for a dispatcher who is directly and contemporaneously involved in the circumstances of any train accident meeting FRA thresholds. See § 219.203. A dispatcher found to have violated FRA's drug and alcohol rules at §§ 219.101 or 219.102 is required to be removed from covered service and is required to complete a rehabilitation program. See § 219.104. A dispatcher who refuses to submit a required sample must be removed from covered service for nine months and must complete a rehabilitation program. See §§ 219.104, 219.107, and 219.213. All dispatchers working in the United States who are controlling United States railroad operations are covered by part 219, and FRA believes, with the two exceptions previously noted, that any extraterritorial dispatcher controlling domestic operations must be covered by the same or fully equivalent requirements.¹⁰ To allow any other dispatchers who are not subject to the comprehensive and stringent testing requirements that DOT and FRA believe are necessary for rail safety to control domestic operations would be contrary to FRA's safety efforts.

The Canadian Government, in its comments on part 219 NPRM, and CN and CP in their comments in both the part 219 and part 241 rulemakings argued that the Canadian regulatory system, together with the railroads' voluntary drug and alcohol programs provide a functional equivalent to part 219. They cite to the following as five elements of the Canadian rail safety program: (1) The Canadian railroads' operating Rule G (Canadian Rule G), which prohibits the use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty;

¹⁰ As previously noted, an employee of a foreign railroad whose primary reporting point is located outside of the United States and who performs dispatching service in the United States is exempt from certain part 219 requirements. See § 219.3(c). FRA has published an NPRM that would revise part 219 to require drug and alcohol testing of such employees. Elsewhere in today's edition of the **Federal Register**, FRA is publishing a notice extending the comment period on the NPRM.

(2) the Canadian railroads' voluntary implementation of comprehensive drug and alcohol programs that provide for pre-employment and pre-placement (or pre-assignment) drug testing to risk-sensitive positions, reasonable cause testing, and return-to-service testing; (3) the Railway Safety Management System Regulations, which require Canadian railroads to implement and maintain safety programs; (4) the Canadian Railway Safety Act, which mandates regular medical examination every three to five years, depending upon the age of the employee, for all persons occupying safety-critical positions (including dispatchers and train crews), and which requires physicians and optometrists to notify the employing railroad's Chief Medical Officer if the employee has a medical condition that could be a threat to safe railroad operations; (5) Transport Canada's role in monitoring compliance with Canadian Rule G and auditing railroad safety programs; and (6) criminal prosecutions—under the Canadian Criminal Code it is an offense to operate railway equipment while impaired by alcohol or a drug, or to have a blood alcohol concentration level greater than .08 percent.¹¹

CN indicated that despite the drug and alcohol measures that have been adopted in Canada, it believed that random drug testing is also needed. CN urged FRA to continue to press Transport Canada to adopt a random drug testing requirement. However, both CN and CP expressed concern that, under current Canadian human rights legislation, employees could challenge implementation of part 219's random drug testing requirement to Canadian railroad employees (such as Canadian train crews operating in the United States), and such challenges would lead to significant costs and potential disruption to their rail operations.

FRA commends the Canadian railroads and Canadian Government for their efforts to stem drug and alcohol abuse by Canadian railroad employees. However, FRA believes that the measures that have been implemented to date in Canada are neither

¹¹ Under the Canadian criminal code police officers (including railway police officers) are entitled to test for presence of alcohol through approved breathalyser machines on reasonable cause. Penalties for violation of the criminal code include the possibility of fines and imprisonment. CN reported that over the past five years there have been four CN employees charged with this offense, one of which was a member of a train crew; the others were engineering or mechanical employees operating on or off-track equipment. CP reported that, between January 1998 and February 2002, five of its employees were charged with this offense; seven others were investigated but no charges were filed after an arrest, or the individuals were cleared of the charge.

comparable to the requirements of part 219, nor adequate to safeguard United States railroad operations were Canadian dispatching of these operations to become widespread. FRA also notes that since July 1, 1997, Canadian trucking companies with drivers assigned to operate commercial motor vehicles in the United States have had to comply with United States Department of Transportation substance-testing requirements similar to part 219, and that compliance with part 219 (in the case of Canadian train crews that operate in the United States) may not be as troublesome as CN and CP anticipate.

Transport Canada has approved Canadian Rule G, which was developed by the Canadian railroad industry, but Transport Canada has not reviewed and approved individual railroad plans implementing Canadian Rule G.¹² Like other aspects of the Canadian regulatory scheme, Canadian Rule G relies very much on self-regulation and implementation with broad oversight by the Canadian government. Such an approach is in stark contrast to part 219, which mandates very specific requirements that the testing plans of domestic railroads must include.

Canadian Rule G has several significant differences compared to part 219. First, it fails to provide for alcohol and drug testing of railroad employees to detect and deter violations. Prior experience with a Rule G approach in the United States has revealed that such a rule alone, without the random and other tests required by part 219, is not effective in detecting and deterring drug and alcohol abuse among safety sensitive railroad employees. Second, Canadian Rule G does not directly prohibit the off-duty use of drugs and abuse of alcohol by dispatchers, in contrast to FRA's regulations, which prohibit any off-duty use of drugs, and which prohibit use of alcohol within four hours of reporting for covered service or after receiving notice to report for covered service since such usage may ultimately affect an individual's

performance on the job. See §§ 219.101(a)(3) and 219.102.

Prior to the adoption of part 219 in 1985, railroads in the United States had attempted to deter alcohol and drug use by their employees by their Rule G, which prohibited operating employees from possessing and using alcohol and drugs while on duty, and from consuming alcoholic beverages while subject to being called for duty. The customary sanction for violation of Rule G was dismissal. Unfortunately, accident reports revealed that the United States railroads' Rule G efforts were not effective in curbing alcohol and drug abuse by railroad employees. 47 FR 30726 (1983). Railroads were able to detect only a relatively small number of Rule G violations owing, primarily, to their practice of relying on observations by supervisors and co-workers to enforce the rule. FRA found that there was a "conspiracy of silence" among railroad employees concerning alcohol and drug use. 49 FR 24281 (1984). Despite Rule G, industry participants confirmed that alcohol and drug use occurred on the United States railroads with unacceptable frequency. Available information from all sources "suggest[ed] that the problem includ[ed] 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individuals reporting to work impaired, and repeated drinking and drug use by individual employees who were chemically or psychologically dependent on those substances." *Id.* at 24253-24254. FRA identified multiple accidents, fatalities, injuries and property damage that resulted from the errors of alcohol- and drug-impaired railroad employees. *Id.* at 24254. Some of these accidents involved the release of hazardous material and, in one case, the release required the evacuation of an entire Louisiana community. *Id.* at 24254, 24259. These findings led FRA to promulgate the initial version of part 219 in 1985. The regulations do not restrict a railroad's authority to impose more stringent requirements. 50 FR 31538 (1985).

A review of the Canadian Rule G violations reported by CP indicates that the Canadian Rule G has resulted in the identification of an extremely low number of operating crew violators. CP reported that in the period 1995-2001, when there were between 3,900 to 4,700 operating crew employees per year, there was a total of only 26 Canadian Rule G operating crew violators for the period. It is likely that the true level of drug and alcohol abuse among Canadian operating crew employees was much higher. For example, a 1987 survey

commissioned by a Canadian Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry revealed that 20 percent of 1,000 randomly-selected Canadian railway workers admitted that they had come to work feeling the effects of alcohol, and 2.5 percent admitted that they had used illegal drugs during their shift. In addition, CN's drug screening of its employees has shown a significant level of drug abuse among its employees.¹³ Furthermore, alcohol and drug testing of safety sensitive railroad employees in the United States found a significantly higher level of substance abuse prior to the introduction of random testing.

FRA's own data, compiled from domestic railroad reports, shows a significantly higher level of substance abuse among safety-sensitive railroad employees in the United States prior to the introduction of random testing. For example, in 1988, the industry positive rates for reasonable cause testing were 4.7 percent for drugs and 4.5 percent for alcohol. After the introduction of random testing in 1989, these rates declined respectively to 2.02 percent and 1.32 percent. While the positive rates for reasonable cause testing have continued to fall, a comparison of the data for post-accident testing reveals an even stronger impact on positive testing rates. In 1988 the positive rate for drugs after qualifying accident events was 5.6 percent. After the commencement of random testing in 1990, this rate fell to 1.1 percent positive. There was a corresponding reduction in post-accident positives from 41 in 1988 to 17 in 1990.

The Canadian Government and CN and CP also rely heavily on the medical assessment that is required for dispatchers under the new Medical Rules for Safety Critical Employees as providing a functional equivalent to random testing. Under these rules, an assessment must be performed every

¹³ CN's submission to a Canadian Standing Committee on Transportation noted that CN had utilized pre-employment drug screening of job applicants since 1986, and these tests yielded a positive rate of 12 percent; similar testing of CN employees transferring to safety-sensitive positions ("pre-placement testing"), such as dispatcher positions, also yielded a positive rate of 12 percent. *In the Matter of an Arbitration Between Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (Union) and Canadian Council of Railway Operating Unions (Intervener)*, Re: the Company's Drug and Alcohol Policy, decision of Arbitrator Michel G. Picher at 56 (July 18, 2000). CN drug screening results from of all sources (pre-placement, reasonable cause, medical examinations, promotions and transfer, reinstatement, and EAP follow-ups) in 1995, showed a 6.4 percent positive test rate in the Eastern Canada, and a 10 percent positive rate in Western Canada. *Id.* At 59-60.

¹² The Canadian Rule G provides that:

(a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

(b) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

(c) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty is prohibited.

(d) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

three to five years, depending on the age of the employee, and include a medical examination. CP notes that the required intervals between assessments result in approximately 25 percent of Canadian employees being examined annually, and it argues that this is approximately the same number of United States rail employees that receive random drug testing per year under part 219.¹⁴

Throughout the preamble to the IFR, FRA emphasized the importance of random drug and alcohol testing in detecting and deterring substance abuse by railroad employees. The deterrent effect of random testing, which was implemented by FRA in 1988–1989, most certainly influenced the dramatic reduction in post-accident positives between the 41 that were recorded in 1988 to the 17 that were recorded in 1990. FRA does not believe that the periodic medical assessments Canadian railroad employees must undergo are the functional equivalent of random testing. The medical model relies primarily on medical examinations that are scheduled in advance. The employees know well beforehand that they will be undergoing an exam, giving them the opportunity to refrain from any activity that may reveal a substance abuse problem. Experience in similar programs in the United States (*e.g.*, in the aviation and motor carrier industries) indicates that routine medical examinations will seldom be successful in identifying alcohol or drug use problems except perhaps in the most advanced stages of chemical dependency when an employee's remaining work life is often limited and major damage has been done to vital organs. Even if an employee is forthcoming in offering that he or she is misusing drugs in his or her personal life, this would apparently not be a disqualifying condition absent medical diagnosis of a specific substance abuse disorder; however, one does not have to be chemically dependant to constitute a threat to public safety. Much of the alcohol and drug use that threatens transportation safety has a voluntaristic

component, and random testing is appropriate as a deterrent. Further, Transport Canada is in the early stages of implementing this program and has not yet had the opportunity to determine program outcomes. For these reasons, it would not be appropriate for FRA to rely upon this program as a full substitute for key DOT program elements, including a prohibition on non-medical use of controlled substance and random testing.

In CP's written comments, it argued that the lack of random testing is the only component of a testing program that would create part 241 compliance problems for the Canadian railroads. These comments were filed before the issuance of the Canadian Human Rights Commission Policy on Alcohol and Drug Testing (CHR Policy) in June of this year. The CHR Policy indicates that pre-employment drug testing is not acceptable, throwing into doubt CN and CP's voluntary pre-employment drug testing programs; pre-employment drug testing for safety-sensitive positions (such as dispatchers) is required by part 219. *See* § 219.501. The CHR Policy does note that Canadian trucking and bus companies wishing to do business in the United States are required to develop drug and alcohol testing programs that comply with U.S. regulations (which include pre-employment drug testing), and that not being banned from driving in the United States may be *bona fide* occupational requirement.

Aside from the fact that FRA believes that random testing is the most important aspect of any testing program and that pre-employment testing is important, FRA is also concerned about two other significant differences between part 219 and the Canadian railroads' testing programs.

First, the criteria for post-accident testing are much more subjective under the Canadian programs than under part 219. In the United States, post-accident testing is required for a dispatcher who is directly and contemporaneously involved in the circumstances of any qualifying train accident. *See* § 219.203. Under the Canadian programs, however, a dispatcher is not automatically tested when he or she is involved in an accident. Instead, the railroad must have independent evidence of impairment before a dispatcher involved in an accident may be tested. Thus, a dispatcher under the influence of drugs or alcohol may contribute to an accident and yet must not be tested if he or she does not exhibit some physical manifestation of impairment. That dispatcher may continue to work without undergoing additional scrutiny

that may reveal a dependency problem that could continue to negatively impact his or her job performance. CN did indicate in its written comments that it plans to revise its policy this year to add mandatory post-accident testing using criteria identical to that in part 219. The CHR Commission Policy Statement endorses the right of Canadian companies to impose such testing for safety-sensitive employees.

Second, a Canadian rail employee may currently decline to be tested and not suffer adverse consequences unless the employer has an independent basis for concluding that the employee is impaired by drugs or alcohol. Under part 219, however, a dispatcher in the United States who refuses a test is immediately suspended for a period of nine months and must follow specified procedures, including return-to-duty and follow-up testing, before being allowed to return to dispatching service. Obviously, the effectiveness of a testing program is severely compromised if an employee is permitted to simply decline to be tested.

E. Hours of Service

Like alcohol or drug impairment, fatigue can cause dispatchers to make mistakes that lead to catastrophic railroad accidents. Both Canadian railroads acknowledged that Transport Canada does not regulate the total hours that dispatchers are allowed to work, but they pointed out that hours of service are covered generally by the Canada Labour Code, and more specifically by collective bargaining agreements between the railroads and their employees. The Labour Code mandates either a 48-hour weekly limit or an 80-hour biweekly limit, although the Code does not mandate a maximum daily limit. With the Code as guidance, both railroads have negotiated similar agreements with their respective labor organizations that limit the number of hours a dispatcher may work per day to 12. Through collective bargaining agreements, dispatchers on both CN and CP may work no more than 48 hours in one week. In addition, on CP, any time worked in excess of 40 hours in one week must be offset by reducing the total hours worked in the next week. Finally, although not included in the comments from either railroad, FRA has learned that Transport Canada is reexamining Canada's hours of service regulations and may introduce comprehensive revisions sometime in the next year.

Despite the apparent flexibility of the hours of service arrangements for Canadian dispatchers, FRA is concerned by the lack of a daily limit for

¹⁴ CP is not entirely correct in making this assertion. Section 219.602 currently sets a minimum random drug testing rate of 25 percent, but this does not mean that 25 percent of covered employees must be tested each year. The requirement is for each railroad to conduct a sufficient number of random drug tests to equal at least 25 percent of it is covered employees. For example, a railroad with 1,000 covered employees must conduct at least 250 random drug tests during the year, but this should not result in 250 employees being tested, since in a truly random program, some employees will be tested more than once while others will not be tested at all. In addition, 25 percent is the minimum random drug testing rate required; railroads remain free to conduct random testing at a higher annual rate.

dispatcher's working hours. In contrast, 49 U.S.C. 21105 mandates strict daily limits on the hours that a dispatcher may work in the United States. Dispatchers in the United States may not work more than nine hours during a 24-hour period in a location where two or more shifts are employed, or 12 hours during a 24-hour period where only one shift is employed. As a practical matter, most domestic railroads, including the Class I and commuter railroads, operate 24-hour dispatching facilities where at least two shifts are employed. The only railroads that might employ a one-shift dispatching operation would be very small short line railroads, although most of those railroads use two shifts, as well. In addition, the fact that many of the limits on hours of service for Canadian dispatchers are dictated by collective bargaining agreements is troublesome to FRA as these agreements are fluid and may change. Although FRA is aware that the duration of daily assignments may be less significant in the onset of fatigue than cumulative effects and biological rhythms, this material difference between U.S. and Canadian practice warrants further review before consideration of expanded cross-border dispatching.

F. Operational Testing

Human performance is critically important to railroad safety. Every year, human factors cause about a third of all train accidents and a large portion of railroad employee injuries in the United States. Under part 217, FRA requires railroads operating in the United States to have operating rules, to periodically instruct dispatchers on those rules, to periodically conduct operational tests (or "efficiency tests," as they are widely known), and inspections on dispatchers to determine the extent of their compliance with the rules, and to keep records of the individual tests and inspections for review by FRA. As with most other regulations, FRA may fine railroads for failure to comply with part 217.

Similar to Transport Canada's regulatory approach to hours of service, Transport Canada does not regulate efficiency testing for dispatchers and, in their comments, the Canadian railroads acknowledged as much. Both railroads, however, use extensive voluntary testing programs and then report the results of the testing to Transport Canada. According to CP's comments, its program provides for the testing of more of the Canadian Rail Operating Rules than is common in the United States. For Canadian-based employees, including dispatchers, CN uses an

extensive efficiency testing program called Performance Monitoring and Rule Compliance, which is virtually identical to the United States testing requirements that CN uses for United States-based dispatching offices. Once the Canadian railroads have reported test results to Transport Canada, Transport Canada then has the authority to audit all railroad activities and, according to CP, has conducted several in-depth audits of CP, the most recent of which occurred in December 2001. CP's comments also noted that the number of accident precursors, or "near misses," on CP attributable to CP dispatchers is very small and has been declining.

Obviously, FRA's proactive approach to ensuring rail safety is very different from Transport Canada's method of encouraging voluntary self-evaluation by the Canadian railroads. Based on FRA's review of the comments, the Canadian railroads' testing program may very well be adequate if continually and evenly applied, but, unlike in the United States, there are no assurances that Transport Canada will provide the regulatory oversight to ensure continued compliance. FRA does not believe it is prudent to rely upon the voluntary efforts of foreign railroads to protect domestic rail safety. As previously noted, FRA will continue to discuss its safety concerns with Transport Canada in an attempt to reach an arrangement that is satisfactory to both countries.

G. Service Disruptions

As FRA noted above, domestic dispatchers are usually unionized employees subject to the provisions of the Railway Labor Act, which prohibits strikes over contract interpretations. Congress has the power to legislate an end to a strike by United States railroad employees, but not to strikes by foreign-based railroad employees who do not enter the United States. Both Canadian railroads felt that the Canada Labour Code will protect against service disruptions arising from labor disputes in Canada.

Canadian dispatchers are subject to the provisions of the Canada Labour Code. In the event of a strike, if the Canadian Industrial Relations Board determines that a strike or lockout could pose an immediate and serious threat to the safety or health of the public, it may order the continuation of services to prevent the danger. Furthermore, if a strike or lockout occurs while Parliament is not in session, and the Governor in Council determines the strike or lockout would adversely affect national interests, the Council may issue an order deferring the strike or lockout

during the period between Parliaments. In addition, CN's comments noted that CN has contingency plans for any labor disruption, including those involving dispatchers. In the event of a disruption, CN is prepared to use supervisory personnel as dispatchers or, in the event of another type of disruption, to move dispatching operations to an alternate location.

While FRA acknowledges that the Canadian Labour Code grants sufficient power to the Canadian government to end labor disruptions in Canada, there is no guarantee that the Code would cover dispatchers controlling track in the United States, even if they were dispatching for a Canadian railroad. The Code clearly gives governing bodies in Canada the authority to take action to protect safety in Canada, but it is not clear that the law covers the safety of United States rail operations or that the Canadian government would take steps to stop labor disputes that disrupt only United States operations. Even if Canadian law authorized the Canadian government to stop labor disputes that disrupt only United States operations, the Canadian government would only exercise that authority as a volunteer, not as a body charged with serving the people of the United States. Neither of the Canadian railroads addressed this critical issue in their comments. As a result, FRA remains concerned that a labor disruption involving extraterritorial dispatchers who control United States territory could cause severe domestic service problems and, as previously discussed, possibly jeopardize transportation safety.

H. Security Concerns

The security of transportation infrastructure has taken on greater significance in the wake of the terrorist attacks of September 11, 2001. As FRA noted in the preamble to the IFR and again in the above discussion, the security of domestic rail operations involves the following two aspects: (1) The security of, and access to, the actual dispatching facilities; and (2) the safety and national security implications involved with allowing foreign dispatch centers to have access to information on movements of military goods and extremely hazardous materials and control over the movement of these items, particularly on the STRACNET.

Both Canadian railroads indicate that they employ security measures that are similar to those employed by domestic railroads. For example, access to dispatching facilities is controlled by multiple levels of security, including card readers and monitored security cameras. Both Canadian railroads are

members of the North American Association of Railroad Chiefs of Police, and both work closely with the Royal Canadian Mounted Police and other North American law enforcement organizations to ensure an effective exchange of information related to security issues. In addition, following the attacks of September 11, both Canadian railroads, along with the domestic railroads, have participated in AAR security working groups and have begun implementing the recommendations made by those groups. CP also noted that they have a fully equipped back-up dispatching facility that can be utilized in the event of an emergency. Neither CN nor CP directly addressed the security issues surrounding the foreign dispatch centers having access to information regarding the shipment of military goods and hazardous materials, including radioactive substances, in the United States and having the ability to control the movement of these items.

FRA recognizes the efforts undertaken by the Canadian railroads to secure their dispatch centers. However, in light of the increased awareness of the need for heightened transportation security following the attacks of September 11, FRA is concerned about allowing foreign dispatch centers to have access to information on movements of military goods and hazardous materials, and to have control over the movements of these items, particularly on the STRACNET.

Furthermore, many of the commodities that railroads transport in large quantities across the United States are extremely dangerous and, if accidentally or intentionally released in urban or environmentally sensitive areas, could cause catastrophic damage. FRA is particularly concerned that these commodities could prove to be tempting targets for terrorist attacks. Moreover, the projected large rail movements of spent nuclear waste will provide even more dangerous targets for terrorists. Finally, given the rapidly changing world-wide terrorism problem confronting the United States, it is of the utmost importance that the domestic railroad network be fully responsive to national defense needs and priorities, including the need to quickly and secretly move military items.

I. International Trade Implications

CP was the only commenter that raised free trade as an issue. CP indicated that part 241 might violate Articles 906 to 911 of Part 3 of NAFTA. These provisions concern Technical Barriers to Trade, and while CP did not make any express statements to that

effect, the comments seemed to imply that part 241 could potentially run afoul of NAFTA. In addition, CP noted that, under the NAFTA, the Land Transportation Standards Subcommittee (LTSS) has authority to address regulatory issues related to cross-border rail operations. CP directed FRA's attention to the latest report from the LTSS, which noted current arrangements do not impede the flow of passenger or freight traffic in North America. CP argued that if FRA believes extraterritorial dispatching to be a legitimate safety threat, the LTSS should first examine the issue before FRA takes any other action. CP also proposed as an alternative to part 241 the formal adoption of a "border zone" that would provide a limited distance on both sides of the Canada-United States border where all railway safety regulations of the other country would be recognized as equivalent.

FRA does not believe that part 241 is contrary to NAFTA, which prohibits Parties to NAFTA from creating unnecessary obstacles to trade between each other. NAFTA requires the Parties to strive to establish compatible standards-related measures so as to facilitate trade in a good or service, and to treat technical standards adopted by the other Parties as equivalent to its own where these standards adequately fulfill the importing Party's legitimate objectives. Under Article 904 of NAFTA, however, each Party retains the right to adopt and enforce any safety measure it considers appropriate to address legitimate safety objectives, including prohibiting the provision of service by a service provider of another Party that fails to comply with the safety measure. Furthermore, under Article 2102, each Party has the right to take any actions that it considers necessary for the protection of its essential security interests.

Under Article 2101, a NAFTA Party has the right to bar access to information which it determines to be contrary to its security. A NAFTA Party also has the right to take other actions it considers necessary for the protection of its essential security interests relating to the traffic in arms, ammunition, and implements of war and to such traffic and transactions in other goods, materials, services, and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment. As such, part 241 serves to control access to information the disclosure of which would be contrary to national security. Allowing extraterritorial dispatching would also increase the possibility that train movement of spent nuclear waste

and portions of the STRACNET would be controlled by foreign-based dispatchers. Some of the rail lines that make up the STRACNET include lines that aid in routing shipments to and from military bases. Part 241 is clearly permissible under NAFTA.

Finally, FRA notes that Mexico has indicated that extraterritorial dispatching of rail operations in the United States poses a safety risk that justifies the promulgation of a bar to such dispatching. Mexico itself has in place a law requiring that all dispatching of Mexican rail operations occur in Mexico.

In this rulemaking document, FRA has articulated legitimate safety concerns, including security concerns, that would result from extraterritorial dispatching, and that support the issuance of the Final Rule. FRA disagrees with the suggestion that it should have submitted its safety concerns to the LTSS rather than proceeding to resolve these concerns in the manner that it has. The rail working group of the LTSS was set up under NAFTA to evaluate the then existing safety regulations of the three countries to determine if they represented impediments to cross-border rail operations. After a thorough review, the group determined that there were no significant impediments. Once that objective had been met, the group was re-formed as the Rail Safety and Economics group of the Transportation Consultative Group (TCG), a sister group of the LTSS that continues to meet to discuss issues of mutual interest. The TCG, like the LTSS, has no power to mandate any changes to a country's regulations—it is an advisory body only.

NAFTA recognized that the signatories might decide, in the future, to institute changes to their respective regulatory regimes; therefore, the treaty mandates that a country wishing to impose or remove a regulation consult with its partners and offer an opportunity for comment. The United States has met its burden in that regard, through discussions with its NAFTA partners during TCG meetings and other bi-lateral meetings with Transport Canada and Mexican officials, and through the formal notice and comment process followed in the issuance of this Final Rule, where both Mexico and Canada, as well as all other interested parties were specifically given the opportunity to comment on the issue of whether FRA should limit extraterritorial dispatching.

The Final Rule that is being adopted attempts to balance United States' safety standards with the safety standards of its NAFTA partners and their railroads

in order to facilitate cross-border railroad operations. FRA has approved a fringe border waiver process that would permit existing extraterritorial dispatching to continue and that would permit new extraterritorial dispatching from Canada and Mexico in the areas in the United States immediately surrounding the Canadian and Mexican borders, without these dispatchers having to fully comply with all of FRA's safety standards for domestic dispatchers. FRA has also provided for a transitional period for existing extraterritorial dispatching to continue while the railroads qualify the operations under the fringe border waiver provision. FRA does not believe that the Canadian commenters have sufficiently made the case that any broader relief is appropriate, or that FRA needed to take any additional steps in promulgating this Final Rule. FRA has pledged its willingness to continue discussing extraterritorial dispatching with its NAFTA partners and their railroads, as well as all other cross-border safety issues; these discussions, together with the safety experience gained under the rule with respect to extraterritorial dispatching, well may lead to future changes to the Final Rule.

J. Economic Impact

CN was the only commenter that questioned the economic analysis and disagreed that the railroads will experience a savings over the next 20 years as a result of part 241 because of the number of unknown factors associated with the ultimate Final Rule. CN argues that until the rule becomes final, costs associated with eliminating the grandfathering and fringe border operations cannot be measured. Even if these provisions are maintained, CN suggests that the costs do not accurately portray the costs of adding FRA programs or of losing flexibility that would follow from the rule. CN also disagrees that the rule will prevent injuries or fatalities and challenges FRA to support that assertion.

FRA has examined the economic impact of the Final Rule and the results of this analysis are set forth in section VI (Regulatory Impact) of the supplementary information below.

K. Language Differences and Units of Measure

Based on the comments submitted by CN and CP, FRA is satisfied that these two railroads have taken steps that address FRA's concerns regarding language differences and designation of units of measurement with respect to dispatching of United States railroad operations from Canada. Eastern Maine

Railway Company did not file comments, and FRA is not aware of how it is handling language and unit of measurement issues.

Both CN and CP use English units and not metric units for all units of measurement, including distance, speed, and locations. In addition, both railroads assured FRA that any dispatching of United States track from Canada would be conducted in the English language. According to CN and CP, the only territory where dispatching is conducted in French is in the Quebec province, and both CN and CP use only bilingual dispatchers and train crews in Quebec. Finally, with only a few minor differences, both Canadian railroads use the same terminology as that used by domestic railroads. FRA notes, however, that while the comments from CN and CP may alleviate FRA's concerns with regard to these railroads, they do not address the potential implications of other railroads dispatching from Canada or of railroad dispatching operations in a country other than Canada.

L. Definitions of "Dispatch" and "Dispatcher," and Special Relief for Fringe Border Operations

Both Canadian railroads as well as the AAR raised concerns over the possible interpretation of the definitions of "dispatch" and "dispatcher" in § 241.5. In addition, CN and CP also argued that the "fringe border operations" exception in §§ 241.9, 241.11, and 241.13, while intended by FRA to promote flexibility in allowing minor cross-border operations in the future, actually had just the opposite effect as the language was too narrow to permit many operations that might fall under the exception.¹⁵

After reviewing the comments, FRA agrees that some of the changes to the definitions of "dispatch" and

¹⁵ In the IFR, FRA had suggested possible parameters for a fringe border exception. In their comments, both CN and CP suggested modifications that would have expanded the scope of the exception. Both railroads recognized that FRA was trying to promote flexibility but argued that the exactness of the language in the rule had just the opposite effect. CP pointed out that, many times, the only purpose of a cross-border operation is to set off, pick up, or interchange cars, but the language of the rule could be read narrowly in order to prohibit that. CN questioned both the "bridge traffic" and "hand-off" operations and offered suggestions to change those operational parameters to make them more practicable. Specifically, CN noted that existing Canadian-based dispatching operations have not presented problems in the past and are of minimal risk, but under the exception as written, very few additional operations would be permissible and suggested that a more reasonable approach would be to allow hand-offs to proceed to a crew change point or a change in traffic control method (not including yard limits) with an overall limit of 15 miles.

"dispatcher" suggested by the commenters would improve the rule. As the comments concern specific language in the rule, FRA will fully address them and explain the rationale for the changes in the section-by-section analysis to follow.

CN and CP supported the concept of a fringe border exception but have asked for greater relief than FRA has determined is appropriate to adequately protect railroad safety. As noted above, the Final Rule does not contain a fringe border operations exception per se, but rather contains a special fringe border waiver process that will permit railroads flexibility in dispatching cross-border operations from Canada or Mexico. See the discussion of the fringe border waiver process in the section-by-section analysis to follow.

M. Comments From Labor Organizations

As noted above, three labor organizations—the BLE, BMW and ATDD—submitted comments on part 241. The comments from the BLE and the BMW were general in nature and supported the position taken by FRA in proposing to bar any additional extraterritorial dispatching, although the BMW did offer one specific comment with regard to the grandfathered operations. Both the BLE and BMW also supported the comments from the ATDD, which also supported FRA's position but included suggestions to change specific provisions in the rule. After reviewing the ATDD's comments, FRA has decided not to make any of the changes suggested by the ATDD.

The ATDD suggested four changes to the IFR. First, with regard to the operations that are grandfathered, the ATDD wanted FRA to require extraterritorial dispatchers controlling those operations to demonstrate, at least semi-annually, familiarity with the operations they are dispatching. Second, the ATDD suggested that the grandfathering exception apply only to current operations and should terminate when ownership of the United States track changes or when operations over that track change. Similarly, the BMW suggested that any grandfathered track segment that is abandoned and then restarted should lose the exception. Third, the ATDD wanted to eliminate waivers for part 241. Finally, the ATDD argued that a railroad's ability to move dispatching operations to another country should be limited to situations where the railroad can prove that such operations could not be transferred to another location in the United States. In addition, railroads should have plans in place to provide a domestic alternative to a foreign location.

As noted above, FRA is not including the grandfathering exception in the Final Rule. Therefore, the ATDD's comments on the grandfathered operations are no longer relevant. With regard to waivers, FRA believes that waivers are necessary in order to maintain flexibility. If a railroad can address all of the concerns that militate in favor of part 241, FRA will definitely consider a waiver. Likewise, in an emergency situation, railroads should be allowed a maximum amount of flexibility in order to safely conduct their operations. By limiting the duration of the permissible extraterritorial dispatching to the duration of the emergency, FRA is effectively balancing the railroads' need for flexibility with the need to maintain domestic rail safety.

V. Section-by-Section Analysis

This section-by-section analysis will explain the provisions of the Final Rule and the changes made from the IFR. Of course, a number of the issues and provisions involving this rule have been discussed and addressed in detail in the preceding discussions. Accordingly, the preceding discussions should be considered in conjunction with those below and will be referred to as appropriate. Also, as the majority of the rule text introduced in the IFR remains unchanged in this Final Rule and there were no comments on the other portions of the section-by-section analysis, much of the section-by-section analysis included in the IFR is repeated here.

Section 241.1 Purpose and Scope

Paragraph (a) states that the purpose of the rule is to prevent railroad accidents and incidents, and consequent injuries, deaths, and property damage, that would result from improper dispatching of railroad operations in the United States by persons located outside of the United States. As noted earlier in the preamble, dispatchers are responsible for establishing a train's route and ensuring that the train has a clear track in front of it. As such, it is essential that dispatching be conducted as safely as possible in order to avoid incidents such as collisions and derailments that endanger train crews, other railroad employees, and the general public.

Paragraph (b) states that the rule prohibits extraterritorial dispatching of railroad operations, conducting railroad operations that are extraterritorially dispatched, and allowing track to be used for such operations, subject to certain stated exceptions. Because FRA believes that extraterritorial dispatching presents serious safety problems and

because proper dispatching is such an integral part of safe railroad operations, FRA is generally prohibiting any extraterritorial dispatching of United States rail operations, except in cases of emergencies. However, FRA has determined that it is appropriate to provide special relief for the four existing extraterritorial dispatching operations (listed in appendix A to the rule), and for limited new extraterritorial dispatching of fringe border areas in the United States designed to facilitate the smooth handoff of dispatching between dispatchers in Canadian and Mexico and those in the United States. Such relief is best granted in the context of waivers rather than blanket approvals of the operations; the special waiver process is discussed below. Of course, railroads subject to this part may adopt and enforce additional or more stringent requirements provided they are not inconsistent with this part.

Section 241.3 Application and Responsibility for Compliance

This section employs what is essentially standardized regulatory language that FRA uses in most of its rules. Paragraphs (a) and (b) mean that railroads whose entire operations are conducted on track within an installation that is outside of the general railroad system of transportation in the United States (in this paragraph, "general system") are not covered by this part. See 49 CFR part 209, appendix A for a discussion of "general railroad system of transportation." Tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system would, therefore, not be subject to this part. The word "installation" is intended to convey the meaning of physical (and not just operational) separateness from the general system. A railroad that operates only within a distinct enclave that is connected to the general system only for the purposes of receiving or offering its own shipments is within an installation. Examples of such installations are chemical and manufacturing plants, most tourist railroads, mining railroads, and military bases. However, a rail operation conducted over the general system in a block of time during which the general system railroad is not operating is not within an installation and, accordingly, not outside of the general system merely because of the operational separation.

Paragraph (c) clarifies FRA's position that the requirements contained in this Final Rule are applicable not only to any "railroad" subject to this part but also to any "person," as defined in

§ 241.5, that performs any function required by this Final Rule. Although various sections of the Final Rule address the duties of a railroad, FRA intends that any person who performs any action on behalf of a railroad or any person who performs any action covered by the Final Rule is required to perform that action in the same manner as required of a railroad or be subject to FRA enforcement action. For example, contractors that perform duties covered by these regulations would be required to perform those duties in the same manner as required of a railroad.

Section 241.5 Definitions

This section contains a set of definitions intended to clarify the meaning of important terms as they are used in the text of the rule. Several of the definitions involve fundamental concepts that require further discussion.

Dispatch. Based on the comments received from the Canadian railroads and the AAR, FRA is modifying the definitions of both "dispatch" and "dispatcher" in order to avoid confusion about the job categories that could potentially be covered by the definition. FRA intended the definition of "dispatch" to be function-specific, not job-specific, but recognizes that the definitions, as written in the IFR and if not read in conjunction with the preamble, could be misinterpreted to include employees, such as yardmasters, performing tasks that FRA did not intend to be included. The commenters agreed with the preamble language but were troubled by the fact that the language was not included in the rule text.

In the IFR, FRA stated that "dispatch" means to control the movement of a train or other on-track equipment by the issuance of a written or verbal authority. In addition, the definition of "dispatcher" could include, among other specifically mentioned job categories, yardmasters. The Canadian railroads were understandably concerned that a yardmaster performing a duty other than dispatching could fall under the definition merely by virtue of his or her job title. Likewise, the AAR was concerned that a track foreman giving permission to a train to enter working limits would be considered "controlling the movement of a train" by issuance of a track authority to the train and, thus, could fall under the definition. The AAR suggested that the problem could be corrected by eliminating the enumeration of the types of employees who may at times perform dispatching functions and asked that FRA clarify that a track foreman giving authority to a train to

proceed is not considered dispatching. CP suggested that the definition of "dispatch," along with the definition of "dispatcher," be revised to more closely parallel the definition used in the hours of service regulations found at part 228.

FRA agrees that the definitions could lead to confusion and has decided to modify both. Therefore, FRA is more explicitly limiting the functions that would fall under the definition of "dispatch" to only those duties that would be performed by a "dispatching service employee" as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), were these functions to be performed in the United States. To that effect, FRA has removed the portion of the definition providing that "dispatch" means to use a telegraph, telephone, radio, * * * and " * * * hand delivery," but has retained the provisions for "electrical or mechanical device" as an example of how someone who is dispatching can control train movement. FRA retained this portion of the definition to clarify that the definition is intended to more closely track both the statutory definition of "dispatching service employee" as well as previous agency interpretations on hours of service. Unlike in the IFR where the first sentence of the definition is an abstract statement of the scope of "dispatch," this sentence now sets the limits of what constitutes dispatching and the remainder of the definition is merely clarification language providing examples of the types of activities FRA intends to cover and to not cover under the definition.

Under 49 U.S.C. 21101(2), a "dispatching service employee" is defined as "an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements." This statutory provision has been interpreted by FRA in a statement of agency policy and interpretation codified at part 228, appendix A. Consistent with that interpretation, both the statutory definition and part 241's definition of "dispatch" are functional, meaning that an individual's job title is irrelevant in determining whether he or she is dispatching. In addition, whether the individual is employed by a railroad is irrelevant. However, unlike the statutory definition of "dispatch," the regulatory definition makes clear that the location of the individual performing the dispatching is irrelevant to the determination of the function the individual is performing. Thus, an individual located in a foreign country who, because of his or her job duties,

would be covered by the statutory definition if he or she were located in the United States would be dispatching within the meaning of § 241.5. Finally, as FRA stated in the preamble to the IFR and wants to make perfectly clear in this Final Rule, FRA does not intend that yardmasters as a job category fall within the scope of the definition. Instead, yardmasters are only covered by this part when they are performing dispatching functions.

Subsection (i) of the definition gives specific examples of the types of functions that one who dispatches would perform in order to be considered dispatching. In particular, FRA intends that anyone controlling the "movement of a train," which is defined in another paragraph of this section as a movement of on-track equipment requiring a power brake test under parts 232 or 238, would be considered dispatching and, therefore, would fall within the scope of the rule. Another type of movement that FRA intends to include is the movement of certain other on-track equipment, such as specialized maintenance-of-way equipment, that is not subject to the power brake regulations. FRA still intends to exclude movements of on-track equipment used in the process of sorting and grouping rail cars inside a railroad yard in order to assemble or disassemble a train.

Subsection (i) also explicitly notes two methods of controlling movements that fall within the scope of the definition. The first method that FRA considers dispatching under part 241 is controlling movements by the issuance of a written or verbal authority or permission that affects a railroad operation, such as through movement authorities and speed restrictions, and includes the following:

Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other methods of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a [dispatcher]. Operating Practices Safety Advisory (OPSA-96-03), reissued as OP-97-34, p. 7.

"Railroad operation" is defined in another paragraph of this section as the movement of a train or other on-track equipment (except as specified earlier) or "the activity that is the subject of an authority issued to a roadway worker for working limits."

The second method that falls within the scope of the definition of "dispatch" is to control a movement "by establishing a route through the use of a signal or train control system but not merely by aligning or realigning a switch." This provision makes clear that

the act of aligning or realigning a switch alone is not sufficient to constitute dispatching. In order to constitute dispatching within § 241.5, aligning or realigning a switch must be accompanied by the act of setting a signal authorizing movement over a track segment. This exclusion is consistent with FRA's interpretation in Operating Practices Technical Bulletin (OP-96-04) and Operating Practices Safety Advisory (OPSA-96-03), reissued as OP-97-34 (hereinafter, "OP-97-34").

Subsection (ii) of the definition of "dispatch" clarifies that those railroad employees who issue an authority for either a roadway worker or stationary on-track equipment, or both, to occupy a certain stretch of track while performing repairs, inspections, etc., will also be covered by this rule. FRA included this section to distinguish this activity from that of authorizing movement of trains or other on-track equipment onto track.

Subsection (iii) of the definition of "dispatch" states another function of a dispatcher, which is to issue an authority for working limits to a roadway worker. As defined in another paragraph of this section,

[working limits] means a segment of track with definite boundaries established in accordance with part 214 of this chapter upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through "exclusive track occupancy," "inaccessible track," "foul time" or "train coordination" as defined in part 214 of this chapter.

Finally, paragraph (2) of the definition of "dispatch" has been rewritten to further clarify that the term excludes several types of activities that might mistakenly be considered to fall within the scope of the definition. Paragraph (2) limits the exclusions, however, to personnel in the field. Subsection (i) specifically excludes from the scope of the definition the carrying out of a written or verbal authority or permission or an authority for working limits. As further clarification, subsection (i) notes two examples of activities that would fall under the exclusion, provided they were carried out by field personnel: Initiating an interlocking timing device and, in response to the AAR's comments, authorizing a train to enter working limits. Subsection (ii) specifically excludes from the scope of the definition the operation by field personnel of a function of a signal system intended to be used by those

field personnel, such as initiating an interlocking timing device.

Dispatcher. As noted above, in order to make explicitly clear that an individual's job title does not determine whether the functions he or she performs will be considered "dispatching" FRA has revised the definition of "dispatcher" to remove all job categories and instead has made the definition entirely function-specific. Therefore, any individual, regardless of job title, performing any of the functions encompassed by the definition of "dispatch" will be considered a "dispatcher" and will fall within the ambit of part 241.

Emergency. The definition of "emergency" remains unchanged from the IFR. An "emergency" under this part must be unexpected and unforeseeable and must interfere with a railroad's ability to dispatch a United States railroad operation domestically to the extent that if the operation is not dispatched extraterritorially there would be a substantial disruption in rail traffic or a significant safety risk. Planned shortages of domestic dispatchers relating to vacation scheduling or the railroad's failure to maintain an adequate list of extraboard employees and foreseeable train delays due to substandard maintenance and repair of rail equipment are not emergencies.

Typical examples of emergencies are the following: The sudden illness of a domestic dispatcher about to begin working the next duty shift when there is no other domestic employee nearby who could be called to substitute; the delay of a train operating on mainline track in reaching its station when the delay is due to the derailment of another train and the domestic dispatching office was scheduled to close until the next day after the domestic dispatcher completed his or her tour of duty; and unforeseeable system failures resulting in significant train delays when the available pool of domestic relief dispatchers is insufficient to safely handle the increased traffic density. In addition, other situations may constitute part 241 emergencies, depending on all the facts involved. The determination of whether a situation is an emergency must always be made on a case-by-case basis.

Finally, if extraterritorial dispatching service needed to abate an emergency is concluded before the end of a duty tour, the emergency provision does *not* provide license to continue the extraterritorial dispatching if an emergency no longer exists.

Extraterritorial dispatcher. The definition of "extraterritorial

dispatcher" remains unchanged from the IFR. An "extraterritorial dispatcher" is an individual who, while performing the function of a dispatcher from a country other than the United States, dispatches a railroad operation that takes place in the United States.

Extraterritorial dispatching. The term has been slightly reworded to mean the act of dispatching a railroad operation that occurs on trackage in the United States by a dispatcher located outside the United States.

Fringe border dispatching. This is a new definition that relates to the new fringe border waiver provision. "Fringe border dispatching" is defined to mean the act of extraterritorial dispatching a railroad operations that occurs on trackage in the United States immediately adjacent to the border by a dispatcher who is a railroad employee located in Canada or Mexico.

Movement of a train. This term remains unchanged from the IFR. FRA intends it to have the same meaning as does the term "train" in 49 CFR 220.5.

Occupancy of a track by a roadway worker or stationary on-track equipment or both. This term remains unchanged from the IFR and refers to the physical presence of a roadway worker or stationary on-track equipment on a track for the purpose of making a repair, an inspection, or another activity not associated with the movement of a train or other on-track equipment. It is intended to cover situations where a stretch of track is being occupied for a certain period of time by roadway workers, with or without on-track equipment, for purposes not related to the movement of a train.

Roadway worker. This term remains unchanged from the IFR and is intended to have the meaning it has in 49 CFR 214.7 and 220.5.

Section 241.7 Waivers

This section sets forth the procedures for seeking waivers of compliance with the prohibitions and requirements of this rule. As noted above in section IV(M) of the supplementary information, above, the ATDD suggested that FRA not allow waivers of compliance with part 241 because the safety implications surrounding part 241 are too important, and because the waiver section has too many loopholes. FRA disagrees with both of those assertions and believes that the waiver provision must remain in order to allow flexibility. If a railroad proves to FRA's satisfaction that it can safely and securely conduct an extraterritorially dispatched operation, FRA may grant a waiver of the requirements of part 241.

The section has been expanded to provide special relief for the limited railroad operation in the United States that are currently being extraterritorially dispatched, and to facilitate further extraterritorial dispatching of fringe border operations. Paragraph (a) provides the general rules governing waiver requests. This paragraph is consistent with the general waiver provisions contained in other Federal regulations issued by FRA. Requests for waivers may be filed by any interested party. Except as provided by paragraph (b), the filing of a waiver petition does not affect that person's responsibility for compliance with the rule while the petition is being considered. In reviewing waiver requests, FRA conducts investigations to determine if a deviation from the general prohibitions and requirements can be made without compromising or diminishing rail safety. FRA recognizes that circumstances may arise when conduct of extraterritorial dispatching that does not fall within one of the exceptions to the prohibition contained in this rule is appropriate and in the public interest. However, FRA will normally expect an applicant to demonstrate that the dispatchers are subject to the same or comparable safety standards as those applicable to dispatchers located in the United States, that those standards will be enforced by FRA or by the host country with supplementary FRA oversight, and that the additional safety concerns previously identified, such as security, language and measurement differences, possible labor strikes and other disruptions, are adequately addressed.

Paragraph (b) is new. It provides special dispensation for existing extraterritorial dispatching. A railroad that files a waiver request seeking to continue extraterritorial dispatch of an operation that it has dispatched pursuant to the terms of the Interim Final Rule, may continue extraterritorial dispatching of that operation until the railroad's waiver request is acted upon by FRA if the petition is filed no later than April 11, 2003. If the waiver request is for an operation not listed in appendix A, the waiver request must describe when the extraterritorial dispatching of the operation commenced and how the dispatching was authorized by the terms of the IFR. FRA will notify the railroad if FRA determines that the operation was not permitted by the terms of the IFR.

Paragraph (c), covering fringe border dispatching, is also new. As previously noted, FRA has determined that it is appropriate to provide special relief for the four existing extraterritorial

dispatching operations (listed in appendix A to the Final Rule, the longest of which is 99 miles), which have been conducted for some time, and for limited new extraterritorial dispatching (limited to 5 route miles from the border) to facilitate hand-offs between foreign and domestic dispatchers. FRA recognizes that it may not always be safe or practical to conduct a hand-off operation exactly at the border, which may be a milepost in the middle of nowhere, and that more appropriate hand-off points may be locations in the United States close to the border. Given the limited length of the operations contemplated under this special waiver process, FRA is willing to permit the operations to be conducted with fewer safety requirements than would be required for longer operations in the United States. FRA is not suggesting that allowing these fringe border operations, even with these restrictions, is completely without risk or as safe as operations that are subject to the full range of safety requirements applicable to domestic dispatchers. However, FRA believes that the fringe border waiver provision strikes the proper balance between the risks of the operations and the necessity of allowing the railroads some flexibility and the need to promote the smooth flow of commerce across the border.

A fringe border waiver request by a railroad will generally be granted if (1) the railroad has taken adequate steps to ensure the security of its dispatch center, (2) the railroad has in place specified safety programs for its extraterritorial dispatchers, (3) a government safety agency in the country where the dispatching will occur has safety jurisdiction over the railroad and the dispatchers and is satisfied with the railroad's safety programs, and (4) the railroad agrees to abide by the operating restrictions specified in the rule. FRA anticipates that both Canadian and Mexican railroads can easily meet these requirements for cross-border dispatching of operations, and that FRA will be able to work out satisfactory arrangements with the railroads and the regulatory agencies in Canada and Mexico concerning the monitoring of the agreed upon safety programs.

An applicant railroad must describe the line proposed to be dispatched and supply the following documents with respect to its safety programs covering the fringe border operation:

(1) A copy of the operating rules of the railroad that would apply to the proposed fringe border dispatching, including hours of service limitations, and the railroad's program for testing the dispatchers in accordance with

these operating rules and for ensuring that the dispatchers do not work in excess of the hours of service restrictions. Based on their comments, CP and CN have developed adequate safety programs that address this requirement.

(2) A copy of the railroad's drug and alcohol abuse prevention program that applies to the fringe border dispatchers. The program shall, to the extent permitted by the laws of the country where the dispatching occurs, contain the following: preemployment drug testing; a general prohibition on possession and use of alcohol and drugs while on duty; reasonable cause alcohol and drug testing; a policy dealing with co-worker and self-reporting of alcohol and drug abuse problems; post-accident testing; and random drug testing. FRA is not requiring that a railroad's program track the requirements of part 219. Based on the comments that have been filed, existing CN and CP programs are adequate given the current state of the law in Canada which would seem to bar Canadian railroads from unilaterally conducting random drug testing of their dispatchers. Of course, Canadian law may change in the future.

(3) A verification from a government agency in the country where the dispatching will occur that the agency has safety jurisdiction over the railroad and the proposed dispatching, and that the railroad's safety programs referenced above meet the safety requirements established by the agency or, in the absence of established safety requirements, that the programs are satisfactory to the agency. The purpose of this requirement is to ensure that a government agency with jurisdiction over the railroad and the dispatchers is satisfied with the railroad's safety programs. CN and CP should be able to secure such a statement from Transport Canada. FRA will consult with the relevant government agency to ensure that railroad's safety programs are actually carried out.

(4) An applicant railroad must also detail the steps the railroad has taken to ensure the security of the dispatch center where the fringe border dispatching will take place. CN and CP have indicated in their comments that they believe that their dispatch centers are secure. FRA currently does not have sufficient information to know whether these representations are accurate.

Finally, absent a waiver, the railroad must agree to abide by the following operating requirements, none of which should pose a problem for Canadian or Mexican railroads:

(1) The trackage in the United States being extraterritorially dispatched shall

not exceed the following route miles, measured from the point that the trackage crosses the United States border: for operations that were normally operated pursuant to the term of the IFR, the route miles normally operated by the railroad in conducting the operations; or, for all other operations, five route miles.

(2) Except for unforeseen circumstances such as equipment failure, accident, casualty, or incapacitation of a crew member, each extraterritorially dispatched train shall be under the control of the same assigned crew for the entire trip over the extraterritorially dispatched trackage.

(3) The fringe border dispatcher shall communicate instructions to the train crew and maintenance of way employees working on the line in the English language and, when referencing units of measurement, shall use English units of measurement. If the railroad wishes to use some other language it can seek a waiver of this requirement.

(4) The rail line shall be under the exclusive control of a single dispatching district or desk.

(5) The dispatching of the train shall be transferred from the fringe border dispatcher to a dispatcher located in the United States at one of the following locations: interchange point; signal control point; junction of two rail lines; established crew change point; yard or yard limits location; inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or location where there is a change in the method of train operations. In the IFR, FRA required that the portion of the line being extraterritorially dispatched extend no farther into the United States than the first of these locations in order to qualify for an exemption. FRA is no longer insisting on such a requirement. At many of these points, a train would actually be required to stop, which would facilitate the hand-off of dispatching functions. If a railroad that extraterritorially dispatches an operation that passes more than one of those points concludes that it would be safer or more efficient to hand-off an operation at a point other than the first point, that railroad may continue to extraterritorially dispatch that operation to another point provided that point is not beyond the mileage limit specified in the rule.

*Section 241.9 Prohibition Against Extraterritorial Dispatching; Exceptions**Section 241.11 Prohibition Against Conducting a Railroad Operation Dispatched by an Extraterritorial Dispatcher; Exceptions**Section 241.13 Prohibition Against Track Owner's Requiring or Permitting Use of Its Line for a Railroad Operation Dispatched by an Extraterritorial Dispatcher; Exceptions*

These sections contain a series of three prohibitions, each containing two exceptions and a provision on liability for violation of the prohibition. Unlike in the IFR, these sections do not contain exceptions for operations that were regularly being extraterritorially dispatched as of December 1999, or for fringe border operations. As was explained above, FRA has decided to provide special relief for existing extraterritorial dispatching and for new dispatching of fringe border operations through the fringe border waiver process discussed above. To promote compliance, each provision imposes a strict liability standard. Actual or constructive knowledge of the facts constituting the violation is not required to establish a violation. For example, it is not necessary for a railroad conducting a railroad operation to know that the operation is being extraterritorially dispatched in order for the railroad to violate § 241.11.

Section 241.9(a) establishes a general rule barring a railroad from requiring or permitting one of its employees or one of its contractors' employees to dispatch a railroad operation that occurs in the United States while the railroad's employee (or railroad contractor's employee) is located outside the United States. A separate violation occurs for each railroad operation so dispatched, and each day the violation continues is a separate offense. "Railroad operation" is defined in § 241.5. A dispatcher working in a foreign country and controlling only railroad operations in that country would not violate § 241.9(a). Likewise, a dispatcher located in the United States and controlling train operations in another country would not violate § 241.9(a), although nothing in this rule authorizes such a practice where it contravenes the domestic law or policy of the country where the railroad operations are conducted.

Section 241.11(a) creates a general prohibition against performing a railroad operation on track in the United States if the railroad operation is dispatched by an individual located outside the United States. A separate

violation occurs for each railroad operation performed that was so dispatched; each day the violation continues is a separate offense.

Section 241.13(a) generally forbids a track owner from requiring or permitting a segment of track that it owns to be used for a railroad operation in the United States that is controlled by a dispatcher in another country. A separate violation occurs for each railroad operation so dispatched that was permitted to occur on the owner's track and each day the violation continues is a separate offense.

There are two basic exceptions to each of these three general prohibitions. First, under paragraph (b) of §§ 241.9–241.13, extraterritorial dispatching of railroad operations that was conducted pursuant to the IFR may continue for a 90-day transitional period that ends on April 11, 2003. Second, under paragraph (c) of §§ 241.9–241.13, extraterritorial dispatching is permitted in the event of an emergency. The term "emergency" is defined in § 241.5, which has been discussed earlier. The railroad must notify the FRA Regional Administrator for the region in which the railroad operation occurs, in writing as soon as feasible, either on paper or by electronic mail, that the railroad is conducting such extraterritorial dispatching. If the operation occurs in more than one region, the FRA Regional Administrator for each of the regions in which the operation occurs must be notified. In order to facilitate the notification process, appendix C lists FRA's eight regions and the States that are included in those regions as well as the street and e-mail addresses and fax numbers of the eight regional headquarters where the notification(s) must be sent. Notification need not necessarily be in advance of the performance of the extraterritorial dispatching. The exception is allowed only for the period of time that the emergency exists. If a railroad continues extraterritorial dispatching after the emergency is over, the railroad is in violation of § 241.9(a).

In its comments, the ATDD suggested that FRA limit a railroad's ability to move dispatching operations to another country to situations where the railroad can prove that such operations could not be transferred to another location in the United States. In addition, the ATDD suggested that FRA require that railroads have in place a plan to provide a domestic alternative to a foreign location. As explained in Section III(M), above, FRA rejected the ATDD's suggestions. In an emergency situation, FRA believes that a railroad should be allowed the maximum amount of

flexibility in order to safely conduct any operations and should not be bound by restrictions that, while they may seem legitimate in the abstract, could exacerbate an emergency situation if that situation needs to be resolved as quickly as possible. In addition, depending on the circumstances of the emergency, the safest alternative may not necessarily be to dispatch an operation domestically. By limiting the duration of the extraterritorial dispatching to the duration of the emergency, FRA is effectively balancing the need for flexibility with the need to maintain domestic rail safety.

Paragraph (d) of §§ 241.9–241.13 discusses liability for violations of those sections. As provided in § 241.9(d), liability for extraterritorial dispatching of a railroad operation in the United States in violation of § 241.9 is on the entity that employs the individual who performed the extraterritorial dispatching, typically a railroad or a contractor to a railroad (if any), and if the employing entity is a contractor to a railroad, liability is also on the railroad. For example, if an employee of a railroad contractor performs the extraterritorial dispatching, FRA may hold either the contractor or the railroad or both liable for the violation (in addition to the individual employee and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)).

As stated in § 241.11(d), liability for conducting a railroad operation that is extraterritorially dispatched in violation of § 241.11 is on the entity that conducts the operation, typically a railroad or a contractor to a railroad. For example, if employees of a railroad contractor engage in the movement of a train that is extraterritorially dispatched and not within the exceptions of paragraphs (b) or (c), then FRA may hold either the contractor or the railroad or both liable for the violation (in addition to the individual train crewmembers and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)).

Finally, as provided in § 241.13(d), liability for requiring or permitting the conduct of a railroad operation that is so dispatched over a segment of track is on the owner of the track segment. For purposes of § 241.13, the track owner includes the owner of the track segment, a person assigned responsibility for the track segment under § 213.5(c), and a railroad operating the track segment pursuant to a directed service order issued by the STB under 49 U.S.C. 11123, during the time that the directed service order is in effect. FRA may hold the track owner, the assignee, or the

railroad operating the track under a directed service order, or some or all of such entities liable for a violation of § 241.13 (in addition to the individuals and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)). For example, if the track owner (Company A) has assigned responsibility for the track under § 213.5(c) to Company B and the track is used by a train that is dispatched by a dispatcher located outside of the United States, not within the exceptions of paragraphs (b) or (c), then FRA may assess a civil penalty for violation of § 241.13 against either Company B or Company A, or both.

In a given instance in which an individual outside the United States dispatches a railroad operation that takes place in the United States (not within the exceptions of paragraphs (b) or (c)), three regulatory prohibitions have been violated: §§ 241.9, 241.11, and 241.13. If one single entity dispatches and conducts the railroad operation and owns the track on which the railroad operation occurs, that entity may be assessed a separate civil penalty for each of the three sections violated. On the other hand, if the three functions are performed by a total of three different entities, the entity that performed the function would be assessed a penalty only for the section it violated. As a matter of discretion, in cases where the dispatching railroad fails to notify the FRA Regional Administrator of each region where the track is located of an emergency, FRA may also cite the dispatching railroad for causing the violation of § 241.11(a) by the operating railroad or § 241.13(a) by the track owner.

Section 241.15 Penalties and Other Consequences for Noncompliance

This section identifies three of the sanctions that may be imposed upon a person for violating a requirement of part 241: civil penalties, disqualification, and criminal penalties.

Paragraph (a) on civil penalties parallels the civil penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty of at least \$500 and not more than \$11,000 per violation. Civil penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed \$22,000 per violation may be

assessed. See part 209, appendix A. In addition, each day a violation continues will constitute a separate offense. Civil penalties for violation of part 241 are authorized by 49 U.S.C. 21301, 21302, and 21304 and by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, 110 Stat. 1321-358, 378, Apr. 26, 1996), which requires agencies to adjust for inflation the maximum civil monetary penalties within the agencies' jurisdiction. Consequently, the resulting \$11,000 and \$22,000 maximum penalties were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws. In addition to the civil penalty provision at § 241.15(a), this Final Rule includes a schedule of civil penalties for specific violations of part 241 as appendix B to this part.

Paragraph (b) provides that an individual who fails to comply with a provision of this part or causes the violation of a provision of this part may be prohibited from performing safety-sensitive service in accordance with FRA's enforcement procedures found in subpart D, part 209.

Paragraph (c) of § 241.15 provides that a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying a report required by these regulations, here, a report to the appropriate FRA Regional Administrator(s) concerning extraterritorial dispatching performed under a claim that it was performed to deal with an emergency. Section 21311(a) of title 49, United States Code, reads as follows:

(a) Records and Reports Under Chapter 201.—A person shall be fined under title 18, imprisoned for not more than 2 years, or both, if the person knowingly and willfully—

(1) makes a false entry in a record or report required to be made or preserved under chapter 201 of this title;

(2) destroys, mutilates, changes, or by another means falsifies such a record or report;

(3) does not enter required specified facts and transactions in such a record or report;

(4) makes or preserves such a record or report in violation of a regulation prescribed or order issued under chapter 201 of this title; or

(5) files a false record or report with the Secretary of Transportation.

FRA believes that the inclusion of these provisions for failure to comply with the regulations is important to ensure that compliance is achieved.

Section 241.17 Preemptive Effect

Section 241.17 informs the public of FRA's views regarding what will be the preemptive effect of the Final Rule. While the presence or absence of such a section does not in itself affect the preemptive effect of a Final Rule, it informs the public about the statutory provision that governs the preemptive effect of the rule. Section 20106 of title 49 of the United States Code provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard which provision is not incompatible with a Federal law, regulation, or order and does not unreasonably burden interstate commerce. With the exception of a provision that is not incompatible with Federal law, not an unreasonable burden on interstate commerce, and directed at an essentially local safety hazard, 49 U.S.C. 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations in this Final Rule.

Section 241.19 Information Collection

This provision shows which sections of this part have been approved by the Office of Management and Budget (OMB) for compliance with the Paperwork Reduction Act of 1995. See 44 U.S.C. 3501 *et seq.* A more detailed discussion of the information collection requirements in this part is provided below.

Appendix A—List of Lines Being Extraterritorially Dispatched in Accordance With the Regulations Contained in 49 CFR Part 241, Revised as of October 1, 2002

Appendix B—Schedule of Civil Penalties

This appendix contains a schedule of civil penalties to be used in connection with this part. Because the penalty schedule is a statement of agency policy, notice and comment are not required prior to its issuance. See 5 U.S.C. 553(b)(3)(A).

Appendix C—Geographic Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

This appendix contains a list of FRA's eight regions and the States that are included in those regions as well as the addresses and fax numbers of the eight regional headquarters where notification of emergency extraterritorial dispatching of domestic operations must be sent.

VI. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the Docket Management System at <http://dms.dot.gov>.

As previously noted, currently extraterritorial dispatching of train operations in the United States is very limited. However, there is the prospect of increased use of extraterritorial dispatchers in the absence of regulatory restrictions. FRA has discussed in detail the significant safety concerns associated with extraterritorial dispatching and how the Final Rule carefully resolves these concerns in a manner designed to facilitate cross-border railroad operations.

FRA expects that overall the requirements in the rule would not impose a significant cost on the rail

industry over the next twenty years. For some rail operators, the total costs incurred would exceed the total benefits achieved. For others, the benefits would outweigh the costs incurred.

The following table presents estimated twenty-year monetary impacts associated with the locational and emergency notification requirements for dispatching of United States rail operations. These estimates represent scenarios previously considered by railroads as well as those that could arise from future mergers between Canadian and United States railroads; FRA is not aware of any current merger plans or other plans to use additional extraterritorial dispatchers.

Description	Estimated 20-year costs (NPV)
Canada/U.S. labor rate differential	\$7,889,471
Additional dispatcher supervisors (higher labor rate) ...	235,403
Emergency situation notification	3,332
Dismissed employee compensation	(10,076,059)
Total Net Cost (NPV rounded)	(1,947,853)

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and Final Rules to assess their impact on small entities. FRA has prepared and placed in the docket a Regulatory Flexibility Assessment (RFA), which assesses the small entity impact. Document inspection and

copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590.

Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), FRA has published an interim policy that formally establishes "small entities" as being railroads that meet the line-haulage revenue requirements of a Class III railroad. For other entities, the same dollar limit in revenue governs whether a railroad, contractor, or other respondent is a small entity (62 FR 43024, Aug. 11, 1997).

The RFA concludes that this rule will not have an economic impact on a sizable number of small entities. FRA further certifies that this rule is not expected to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
241.7—Waivers:					
(a) General	4 railroads	1 waiver pet.	4 hours	4 hours	\$157
(b) Special Dispensation— Extraterritorial Dispatching.	4 railroads	4 waiver pet.	4 hours	16 hours	628
(c) Fringe Border Dispatching	4 railroads	2 waiver pet.	4 hours	8 hours	314
241.9—Prohibition against extraterritorial dispatching; ex- ceptions—Notification.	4 railroads	1 notification	8 hours	8 hours	314
241.11—Prohibition against con- ducting a railroad operation dis- patched by an extraterritorial dispatcher, exceptions.	4 railroads	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.	(¹)
241.13—Prohibitions against track owner's requiring or per- mitting use of its line for a rail- road operation dispatched by an extraterritorial dispatcher, exceptions.	4 railroads	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.	(¹)
241.15—Penalties—False Re- ports/Records.	\$628	None	N/A	N/A	N/A

¹ Included under § 241.9.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, 725 17th St., NW., Washington, DC 20503. OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any information collection requirements resulting from this rulemaking action prior to the effective date of this rule. The OMB control number, when assigned, will be announced by a separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, entitled, "Federalism," issued on August 4, 1999, requires that each agency "in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provide[] to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State and local officials have been met * * *."

When issuing the IFR in this proceeding, FRA adhered to Executive Order 13132. Normally, FRA engages in the required Federalism consultation during the early stages of the rulemaking through meetings of the full Railroad Safety Advisory Committee ("RSAC"), on which several representatives of groups representing State and local officials sit. However, when issuing the IFR, FRA determined that, because the possibility existed that railroads could have commenced extensive extraterritorial dispatching at any time, these issues had to be addressed without the benefit of a

presentation to the full RSAC. In order to comply with Executive Order 13132, when preparing the IFR, FRA sent a letter soliciting comment on the Federalism implications of this IFR (and the NPRM involving part 219) that FRA simultaneously published to nine groups designated as representatives for various State and local officials. The nine organizations were as follows: the American Association of State Highway and Transportation Officials (AASHTO), the Association of State Rail Safety Managers, the Council of State Governments, the National Association of Counties, the National Association of Towns and Townships, the National Conference of State Legislatures, the National Governors' Association, the National League of Cities, and the U.S. Conference of Mayors.

In addition, FRA representatives had informal discussions with representatives of some of those groups. During one such consultation, a representative of AASHTO expressed confidence that FRA and State interests would closely coincide on these issues. He noted that the September 2000 meeting of AASHTO's Standing Committee on Rail Transportation would include a significant discussion of the pending STB proceeding (involving the proposed consolidation of CN and BNSF), with the implication that FRA's rulemakings may be a current topic at that time. As of the date FRA published the IFR, FRA had not received any indication of concerns about the Federalism implications of this rulemaking from these representatives. In addition, none of the groups submitted comments in response to the IFR. Therefore, FRA does not believe that this Final Rule raises any federalism issues.

E. Environmental Impact

FRA has evaluated this regulation in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28545, 28547, May 26, 1999. Section 4(c)(20) reads as follows:

(c) Actions Categorically Excluded. Certain classes of FRA actions have been determined to be categorically excluded from the

requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment.

* * * The following classes of FRA actions are categorically excluded:

* * * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. The Final Rule would not result in the expenditure, in the aggregate, of \$100,000,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry,

advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this Final Rule in accordance with Executive Order 13211. FRA has determined that this Final Rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

List of Subjects in 49 CFR Part 241

Communications, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons set forth in the preamble, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations, by adding part 241 to read as follows:

PART 241—UNITED STATES LOCATIONAL REQUIREMENT FOR DISPATCHING OF UNITED STATES RAIL OPERATIONS

Sec.

- 241.1 Purpose and scope.
- 241.3 Application and responsibility for compliance.
- 241.5 Definitions.
- 241.7 Waivers.
- 241.9 Prohibition against extraterritorial dispatching; exceptions.
- 241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.
- 241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.
- 241.15 Penalties and other consequences for noncompliance.
- 241.17 Preemptive effect.
- 241.19 Information collection.
- Appendix A to Part 241—List of Lines Being Extraterritorially Dispatched in Accordance With the Regulations Contained in 49 CFR Part 241, Revised as of October 1, 2002
- Appendix B to Part 241—Schedule of Civil Penalties
- Appendix C to Part 241—Geographical Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

Authority: 49 U.S.C. 20103, 20107, 21301, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49.

§ 241.1 Purpose and scope.

(a) The purpose of this part is to prevent railroad accidents and incidents, and consequent injuries, deaths, and property damage, that would result from improper dispatching of railroad operations in the United States by individuals located outside of the United States.

(b) This part prohibits extraterritorial dispatching of railroad operations, conducting railroad operations that are extraterritorially dispatched, and allowing track to be used for such operations, subject to certain stated exceptions. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§ 241.3 Application and responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to—
(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) Although the duties imposed by this part are generally stated in terms of a duty of a railroad, each person, including a contractor for a railroad, who performs a function covered by this part, shall perform that function in accordance with this part.

§ 241.5 Definitions.

As used in this part:
Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Dispatch means—
(1) To perform a function that would be classified as a duty of a "dispatching service employee," as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. For example, to *dispatch* means, by the use of an electrical or mechanical device—

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

(iii) To issue an authority for working limits to a roadway worker.

(2) The term *dispatch* does not include the action of personnel in the field—

(i) Effecting implementation of a written or verbal authority or permission affecting a railroad operation or an authority or permission affecting a railroad operation or an authority for working limits to a roadway worker (e.g., initiating an interlocking timing device, authorizing a train to enter working limits); or

(ii) Operating a function of a signal system designed for use by those personnel.

Dispatcher means any individual who dispatches.

Emergency means an unexpected and unforeseeable event or situation that affects a railroad's ability to use a dispatcher in the United States to dispatch a railroad operation in the United States and that, absent the railroad's use of an extraterritorial dispatcher to dispatch the railroad operation, would either materially disrupt rail service or pose a substantial safety hazard.

Employee means an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this part.

Extraterritorial dispatcher means a dispatcher who, while located outside of the United States, dispatches a railroad operation that occurs in the United States.

Extraterritorial dispatching means the act of dispatching a railroad operation that occurs on trackage in the United States by a dispatcher located outside of the United States.

Fringe border dispatching means the act of extraterritorial dispatching a railroad operation that occurs on trackage in the United States immediately adjacent to the border between the United States and Canada or the border between the United States and Mexico by a dispatcher who is a railroad employee located in Canada or Mexico.

FRA means the Federal Railroad Administration, United States Department of Transportation.

Movement of a train means the movement of one or more locomotives coupled with or without cars, requiring an air brake test in accordance with part 232 or part 238 of this chapter, except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains.

Occupancy of a track by a roadway worker or stationary on-track equipment

or both refers to the physical presence of a roadway worker or stationary on-track equipment, or both, on a track for the purpose of making an inspection, repair, or another activity not associated with the movement of a train or other on-track equipment.

Person means an entity of a type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; an owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; an independent contractor providing goods or services to a railroad; and an employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any person providing such transportation, including—

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad contractor means a contractor to a railroad or a subcontractor to a contractor to a railroad.

Railroad operation means the movement of a train or other on-track equipment (other than on-track equipment used in a switching operation or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up a train), or the activity that is the subject of an authority issued to a roadway worker for working limits.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance, or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities, or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts.

State means a State of the United States of America or the District of Columbia.

United States means all of the States.

Working limits means a segment of track with definite boundaries established in accordance with part 214 of this chapter upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through “exclusive track occupancy,” “inaccessible track,” “foul time,” or “train coordination” as defined in part 214 of this chapter.

§ 241.7 Waivers.

(a) *General.* (1) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. Except as provided in paragraph (b) of this section, the filing of such a petition does not affect that person’s responsibility for compliance with that requirement while the petition is being considered.

(2) (i) Each petition for waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(ii) Petitions seeking approval to conduct fringe border operations shall also comply with the requirements of paragraph (c) of this section.

(iii) Petitioners not filing under paragraph (c) of this section should review the guidelines at 66 FR 63942 (Dec. 11, 2001), and frame their petitions to address the safety and security concerns articulated in the preamble, or contact the Office of the Chief Counsel, RCC-12, FRA, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590, for a copy of the guidelines.

(3) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions that the Administrator deems necessary.

(b) *Special dispensation for existing extraterritorial dispatching.* (1) A railroad that files a waiver request seeking to continue extraterritorial dispatch of an operation that it has dispatched from Canada or Mexico pursuant to regulations contained in 49 CFR part 241, revised as of October 1, 2002, may continue extraterritorial dispatching of that operation until the railroad’s waiver request is acted upon by FRA if the petition is filed no later than April 11, 2003.

(2) If the waiver request is for an operation not listed in appendix A to this part, the waiver request must describe when the extraterritorial dispatching of the operation commenced and how the dispatching was authorized by regulations contained

in 49 CFR part 241, revised as of October 1, 2002. FRA will notify the railroad if FRA determines that the operation was not permitted by the terms of those regulations.

(c) *Fringe border dispatching.* (1) A waiver request to have a railroad employee located in Canada or in Mexico dispatch a railroad operation in the United States immediately adjacent to the border of the country in which the dispatcher conducts the dispatching will generally be approved by FRA, subject to any conditions imposed by FRA, if the waiver request meets all of the terms of paragraphs (c)(2) and (3) of this section. A proponent of a waiver request may seek relief from the terms of paragraphs (c)(2) and (3) of this section.

(2) The railroad proposing to conduct the fringe border dispatching shall supply the following documents as part of the waiver request:

(i) A description, by railroad division, applicable subdivision(s), and mileposts, of the line proposed to be dispatched;

(ii) A copy of the operating rules of the railroad that would apply to the proposed fringe border dispatching, including hours of service limitations, and the railroad’s program for testing the dispatchers in accordance with these operating rules and for ensuring that the dispatchers do not work in excess of the hours of service restrictions;

(iii) A copy of the railroad’s drug and alcohol abuse prevention program that applies to the fringe border dispatchers. The program shall, to the extent permitted by the laws of the country where the dispatching occurs, contain the following:

(A) Preemployment drug testing;
(B) A general prohibition on possession and use of alcohol and drugs while on duty;
(C) Reasonable cause alcohol and drug testing;

(D) A policy dealing with co-worker and self-reporting of alcohol and drug abuse problems;

(E) Post-accident testing; and
(F) Random drug testing;

(iv) The steps the railroad has taken to ensure the security of the dispatch center where the fringe border dispatching will take place;

(v) The railroad’s plans for complying with the requirements of paragraph (c)(3) of this section; and

(vi) A verification from a government agency in the country where the dispatching will occur that the agency has safety jurisdiction over the railroad and the proposed dispatching, and that the railroad’s safety programs referenced

in paragraphs (c)(2)(ii) and (iii) of this section meet the safety requirements established by the agency or, in the absence of established safety requirements, that the programs are satisfactory to the agency.

(3) Except as otherwise approved by FRA, fringe border dispatching must comply with the following requirements:

(i) The trackage in the United States being extraterritorially dispatched shall not exceed the following route miles, measured from the point that the trackage crosses the United States border:

(A) For operations conducted pursuant to the regulations contained in 49 CFR part 241, revised as of October 1, 2002, the route miles shall be the miles normally operated by the railroad in conducting the operation; and

(B) For all other operations, the route miles shall not exceed five miles.

(ii) Except for unforeseen circumstances such as equipment failure, accident, casualty, or incapacitation of a crew member, each extraterritorially dispatched train shall be under the control of the same assigned crew for the entire trip over the extraterritorially dispatched trackage.

(iii) The fringe border dispatcher shall communicate instructions to the train crew and maintenance of way employees working on the line in the English language and, when referencing units of measurement, shall use English units of measurement.

(iv) The rail line shall be under the exclusive control of a single dispatching district or desk; and

(v) The dispatching of the train shall be transferred from the fringe border dispatcher to a dispatcher located in the United States at one of the following locations within the mileage limits mandated in paragraph (c)(3)(i) of this section:

(A) Interchange point;

(B) Signal control point;

(C) Junction of two rail lines;

(D) Established crew change point;

(E) Yard or yard limits location;

(F) Inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or

(G) Location where there is a change in the method of train operations.

§ 241.9 Prohibition against extraterritorial dispatching; exceptions.

(a) *General.* Except as provided in § 241.7(d) and paragraphs (b) and (c) of this section, a railroad subject to this part shall not require or permit a dispatcher located outside the United States to dispatch a railroad operation

that occurs in the United States if the dispatcher is employed by the railroad or by a contractor to the railroad.

(b) *Transitional period to continue existing extraterritorial dispatching.* A railroad that has normally extraterritorially dispatched railroad track in the United States from Canada or Mexico pursuant to the regulations contained in 49 CFR part 241, revised as of October 1, 2002, may continue extraterritorial dispatching of that railroad track until April 10, 2003, to permit the railroad an opportunity to file a waiver request pursuant to § 241.7.

(c) *Emergencies.* (1) In an emergency situation, a railroad may require or permit one of its dispatchers located outside the United States to dispatch a railroad operation that occurs in the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the railroad operation was conducted, in writing as soon as practicable, of the emergency; and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(3) A list of the States that make up the FRA regions and the street and e-mail addresses and fax numbers of the FRA Regional Administrators appears in appendix C to this part.

(d) *Liability.* The Administrator may hold either the railroad that employs the dispatcher or the railroad contractor that employs the dispatcher, or both, responsible for compliance with this section and subject to civil penalties under § 241.15.

§ 241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

(a) *General.* Except as provided in § 241.5(d) or paragraphs (b) and (c) of this section, a railroad subject to this part shall not conduct, or contract for the conduct of, a railroad operation in the United States that is dispatched from a location outside of the United States.

(b) *Transitional period to continue existing extraterritorial dispatching.* A railroad that has normally conducted, or contracted for the conduct of, a railroad operation in the United States that is extraterritorially dispatched pursuant to the regulations contained in 49 CFR part 241, revised as of October 1, 2002, may continue to conduct or contract for the conduct of the operation until April 10, 2003, to permit the railroad an opportunity to file a waiver request pursuant to § 241.7.

(c) *Emergencies.* (1) In an emergency situation, a railroad may conduct, or contract for the conduct of, a railroad operation in the United States that is dispatched from a location outside the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the railroad operation was conducted, in writing as soon as practicable, of the emergency; and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(3) A list of the States that make up the FRA regions and the street and e-mail addresses and fax numbers of the FRA Regional Administrators appears in appendix C to this part.

(d) *Liability.* The Administrator may hold either the railroad that conducts the railroad operation or the railroad contractor that conducts the operation, or both, responsible for compliance with this section and subject to civil penalties under § 241.15.

§ 241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, an owner of railroad track located in the United States shall not require or permit the track to be used for a railroad operation that is dispatched from outside the United States.

(b) *Transitional period to continue existing extraterritorial dispatching.* An owner of a track segment located in the United States that is extraterritorially dispatched pursuant to the regulations contained in 49 CFR 241, revised as of October 1, 2002, may require or permit the track segment to be continued to be used for a railroad operation that is extraterritorially dispatched until April 10, 2003, to permit the railroad an opportunity to file a waiver request pursuant to § 241.7.

(c) *Emergencies.* In an emergency situation, an owner of railroad track located in the United States may require or permit the track to be used for a railroad operation that is dispatched from outside the United States, provided that:

(1) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the operation was conducted, in writing as soon as practicable, of the emergency and

(2) The extraterritorial dispatching is limited to the duration of the emergency. Written notification may be made either on paper or by electronic mail.

(d) *Liability.* The Administrator may hold either the track owner or the assignee under § 213.5(c) of this chapter (if any), or both, responsible for compliance with this section and subject to civil penalties under § 241.15. A common carrier by railroad that is directed by the Surface Transportation Board to provide service over the track in the United States of another railroad under 49 U.S.C. 11123 is considered the owner of that track for the purposes of the application of this section during the period that the directed service order remains in effect.

§ 241.15 Penalties and other consequences for noncompliance.

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500 and not more than \$11,000 per violation, except that: Penalties may be assessed against individuals only for

willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense.

(b) An individual who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 241.17 Preemptive effect.

Under 49 U.S.C. 20106, the regulations in this part preempt any State law, regulation, or order covering

the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not impose an unreasonable burden on interstate commerce.

§ 241.19 Information collection.

(a) The information collection requirements of this part are being reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

(b) The information collection requirements are found in the following sections: § 241.7(a), (b), (c); 241.9(c); 241.11(c); 241.13(c); and 214.15. When an effective date for these sections is established, FRA will publish notice of that date in the **Federal Register**.

Appendix A to Part 241—List of Lines Being Extraterritorially Dispatched in Accordance With the Regulations Contained in 49 CFR Part 241, Revised as of October 1, 2002

Description of United States track segment being extraterritorially dispatched	Length of United States' track segment	Railroad conducting the dispatching
Maine: Between Vanceboro, Maine and Brownville Junction, Maine.	99 miles	Eastern Maine Ry. Co.
Michigan: U.S. trackage between Windsor, Ontario, and Detroit, Michigan.	1.8 miles	Canadian Pacific Railway Company.
U.S. trackage between Sarnia, Ontario, and Port Huron, Michigan.	3.1 miles	Canadian National Railway Company (CN).
Minnesota: Sprague Subdivision, between Baudette, Minnesota, and International Boundary, Minnesota.	43.8 miles	CN.

Appendix B to Part 241—Schedule of Civil Penalties¹

Section ²	Violation	Willful violation
241.9(a) Requiring or permitting extraterritorial dispatching of a railroad operation	\$7,500	\$11,000
(b) Failing to notify FRA about extraterritorial dispatching of a railroad operation in an emergency situation	5,000	7,500
241.11 Conducting a railroad operation that is extraterritorially dispatched:		
(a)(1) Generally	7,500	11,000
(a)(2) In an emergency situation-where dispatching railroad fails to notify FRA of the extraterritorial dispatching	2,500	5,000
241.13 Requiring or permitting track to be used for the conduct of a railroad operation that is extraterritorially dispatched:		
(a)(1) Generally	7,500	11,000
(a)(2) In an emergency situation-where dispatching railroad fails to notify FRA of the extraterritorial dispatching	2,500	5,000

¹ A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$22,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304 and 49 CFR part 209, appendix A.

² Further designations for certain provisions, not found in the CFR citation for those provisions, and not found in this Appendix, are FRA Office of Chief Counsel computer codes added as a suffix to the CFR citation and used to expedite imposition of civil penalties for violations. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined designation cited in the civil penalty demand letter.

Appendix C to Part 241—Geographical Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

The geographical boundaries of FRA's eight regions and the addresses for the

regional headquarters of those regions are as follows:

(1) *Region 1* consists of Maine, Vermont, New Hampshire, New York, Massachusetts, Rhode Island, Connecticut, and New Jersey. The mailing address of the Regional Headquarters is: 55 Broadway, Room 1077, Cambridge, Massachusetts 02142. The fax

number is 617-494-2967. The electronic mail (E-mail) address of the Regional Administrator for Region 1 is: Mark.McKeon@fra.dot.gov.

(2) *Region 2* consists of Pennsylvania, Delaware, Maryland, Ohio, West Virginia, Virginia, and Washington, DC. The mailing address of the Regional Headquarters is: Two

International Plaza, Suite 550, Philadelphia, Pennsylvania 19113. The fax number is 610-521-8225. The E-mail address of the Regional Administrator for Region 2 is: *David.Myers@fra.dot.gov*.

(3) *Region 3* consists of Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida. The mailing address of the Regional Headquarters is: Atlanta Federal Center, 61 Forsythe Street, SW., Suite 16T20, Atlanta, Georgia 30303. The fax number is 404-562-3830. The E-mail address of the Regional Administrator for Region 3 is: *Fred.Dennin@fra.dot.gov*.

(4) *Region 4* consists of Minnesota, Wisconsin, Michigan, Illinois, and Indiana. The mailing address of the Regional Headquarters is: 300 West Adams Street, Rm 310, Chicago, Illinois 60606. The fax number is 312-886-9634. The E-mail address of the

Regional Administrator for Region 4 is: *Laurence.Hasvold@fra.dot.gov*.

(5) *Region 5* consists of New Mexico, Oklahoma, Arkansas, Louisiana and Texas. The mailing address of the Regional Headquarters is: 4100 International Plaza, Suite 450, Fort Worth, Texas, 76109-4820. The fax number is 817-284-3804. The E-mail address of the Regional Administrator for Region 5 is: *John.Megary@fra.dot.gov*.

(6) *Region 6* consists of Nebraska, Iowa, Colorado, Kansas, and Missouri. The mailing address of the Regional Headquarters is: 911 Locust Street, Suite 464, Kansas City, Missouri 64106. The fax number is 816-329-3867. The E-mail address of the Regional Administrator for Region 6 is: *Darrell.Tisor@fra.dot.gov*.

(7) *Region 7* consists of California, Nevada, Utah, Arizona, and Hawaii. The mailing address of the Regional Headquarters is: 801

I Street, Suite 466, Sacramento, California 95814. The fax number is 916-498-6546. The E-mail address of the Regional Administrator for Region 7 is: *Alvin.Settje@fra.dot.gov*.

(8) *Region 8* consists of Washington, Idaho, Montana, North Dakota, Oregon, Wyoming, South Dakota, and Alaska. The mailing address of the Regional Headquarters is: Murdock Executive Plaza, 703 Broadway, Suite 650, Vancouver, Washington 98660. The fax number is 360-696-7548. The E-mail address of the Regional Administrator for Region 8 is: *Dick.Clairmont@fra.dot.gov*.

Allan Rutter,

Federal Railroad Administrator.

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